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No. 397

In the
Supreme Court of the United States
OCTOBER TERM, 1936

THE HENDERSON COMPANY,
Appellant,

vs.

ERNEST O. THOMPSON, C. V. TERRELL AND LON A. SMITH, ETC., *et al.*,
Appellees.

Appeal from the District Court of the United States for the Western District of Texas

BRIEF FOR APPELLANT

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Appeal from the District Court of the United States for the Western District of Texas

BRIEF FOR APPELLANT

OPINIONS BELOW

The opinion of the District Court for the Western District of Texas, denying appellant an interlocutory injunction, is reported in 12 Fed. Supp. 519, under the style of The Henderson Company versus Ernest O. Thompson, et al. (R. 77.) The opinion of the same court, denying appellant permanent injunction upon the hearing of said cause on the merits, is reported in the consolidated cases styled The Henderson Company versus Ernest O. Thompson, et al, and Portland Gasoline Company versus Ernest O. Thompson, et al, 14 Fed. Supp. 328. (R. 83.)

JURISDICTION

In accordance with Paragraph 1 of Rule 12, statement was duly filed and presented to the court below at the time of allowance of appeal, disclosing the grounds upon which jurisdiction of this Court was invoked. The final decree sought to be reviewed was entered on March 31, 1936. (R. 95.) Petition for allowance of appeal and order allowing appeal (R. 111), together with assignment of errors, were filed on June 23, 1936 (R. 113). On July 23, 1936, the District Court upon application of appellant, duly made, extended the time, for docketing the cause and filing the record in this Court, sixty days from August 2, 1936. (R. 367-368.) Statement as to jurisdiction, the transcript of record and original order extending the time for docketing and filing the record in this Court were filed in this Court on September 25, 1936, and an order was entered in this court on October 19, 1936, noting probable jurisdiction. The jurisdiction of this Court rests on Section 266 of the Judicial Code as amended (Title 28, Section 380, U. S. C. A.) and Section 238 of the Judicial Code as amended (Title 28, Section 345, U. S. C. A.).

QUESTIONS PRESENTED

(1) Whether the Legislature of Texas, under its police power, can prohibit the production and use of natural gas for certain useful and necessary purposes, when as a matter of fact, in the production and use of such gas for such purposes there is no actual physical waste of such gas or disproportionate taking of the same from the common reservoir.

(2) Whether the provisions of the Act under attack, and the orders of the Railroad Commission promulgated in pursuance thereto, classifying and distinguishing between sweet and sour gas and prohibiting the use of sweet gas for the manufacture of carbon black, as applied to appellant's properties, located in the Panhandle gas field of Texas, which is underlaid by a single, interconnected reservoir containing both sweet and sour gas, bear a reasonable relation to the purposes sought to be accomplished or are merely arbitrary and unreasonable.

STATUTE INVOLVED

The Statute of the State of Texas, the validity of certain provisions of which is involved, is Acts of 1935, Forty-fourth Legislature, Regular Session, Chap. 120, page 318, Article 6008 of Vernon's Annotated Revised Civil Statutes of Texas, Revision of 1925, as amended, which statute is commonly referred to as House Bill 266. The statute in full is set forth in Appendix "A" of this brief.

STATEMENT OF THE CASE

This suit was instituted by appellant, The Henderson Company, against Ernest O. Thompson, C. V. Terrell and Lon A. Smith, composing the Railroad Commission of Texas, and William McCraw, Attorney General of Texas. It involves an attack upon the validity and constitutionality of an act of the Legislature of Texas, known as House Bill 266, Chapter 120, passed by the Forty-fourth Legislature of Texas, Regular Session of 1935, and the orders of the Railroad Commission promulgated

thereunder, which act and orders of the Railroad Commission seek to control and regulate the production and use of natural gas within the State of Texas.

The particular provisions of said act under attack are as follows:

> "Sec. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article, to-wit: * * *
>
> "(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half grains of hydrogen sulphide per one hundred cubic feet or more than thirty grains of total sulphur per one hundred cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.
>
> "(h) The term 'sweet gas' shall mean all natural gas except 'sour gas' and 'casinghead gas.'
>
> "(i) The term 'casinghead gas' shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.
>
> "(j) The term 'natural gasoline' shall apply to gasoline manufactured from casinghead or from any natural gas.
>
> "Sec. 3. The production, transportation or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste,' among other things, shall specifically include: * * *
>
> "(j) The use of sweet gas produced from a gas well for the manufacture of carbon black. * * *
>
> "Sec. 7. After the expiration of ten days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

"(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona fide introduction of gas into oil or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

"(2) In addition to the purposes for which sweet gas produced from a well may be used, sour gas may be used for efficient chemical manufacturing purposes, including the manufacture of carbon black, provided it is utilized in a plant producing a recovery of not less than one pound of carbon black to each one thousand cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black."

The orders of the Railroad Commission under attack are the orders of said Commission promulgated in pursuance to said act dated August 5, 1935, amending its order dated July 20, 1935, and its order dated August 1, 1935, and subsequent orders of similar import, which in effect merely follow the provisions of the statute complained of prohibiting the use of sweet gas for the manufacture of carbon black.

The appellant, in its bill, alleges that it is the owner and operator of a gasoline manufacturing plant located near Sanford, Hutchinson County, Texas; that its plant is connected with twenty-one gas wells and that prior

to the effective date of said act it had been receiving gas from such wells and processing the same in its gasoline plant for the purpose of extracting the gasoline content therefrom and supplying the residue gas to Combined Carbon Company, with whom it is under contract to supply the requirements of said Combined Carbon Company; that certain of the wells and leases upon which the same are located are owned outright by appellant, and as to the others, appellant owns and holds gas contracts, under the terms of which it is obligated to take the gas therefrom for processing in its plant. (R. 9-10, 11-12.)

That the leases so owned by appellant and under contract with appellant are located in what is known as the Panhandle Gas Field, which is underlaid by one single or common gas reservoir; that the gas in a portion of said field contains hydrogen sulphide and is known as sour gas; that the gas contained in the balance of said field is free from hydrogen sulphide and is known as sweet gas; that there is no structural barrier between the sweet and sour gas areas; that gas in such field migrates from the high pressure areas to the areas of low pressure, and that withdrawals of gas from one portion of the field will affect the ultimate recovery of gas from the balance of said field. (R. 3.)

That pursuant to the provisions of said act, the Railroad Commission made tests of the various wells located in the Panhandle field, as to their hydrogen sulphide content, and in its order of July 20, 1935, as amended by its orders of August 1 and August 5, 1935, fourteen

of appellant's wells were classified as sweet gas wells, in that they were found by the Commission to contain less than one and one-half grains of hydrogen sulphide per hundred cubic feet; that in such orders the Commission prohibited the use of such gas for the manufacture of carbon black, in accordance with the provisions of said act, leaving appellant only seven wells from which it is authorized, under the provisions of said act, and order of the Railroad Commission, to take gas therefrom for the purpose of processing the same for its gasoline content in its casinghead gasoline plant and delivering the residue thereof for carbon black manufacture. (R. 7-8; 11-12.) That said seven remaining sour wells, even though producing at the full 25 per cent of their open flow or capacity to produce, are insufficient to furnish appellant sufficient gas for its carbon black requirements to Combined Carbon Company and for its own fuel purposes for carrying on its own operations, to the extent of approximately 10 million cubic feet per day. That there are no other sour gas wells or leases in the vicinity of appellant's plant now without connection and market with which appellant can connect in order to supply its carbon black requirements; that the only remaining sour gas without connection or market is undeveloped and located miles distant from appellant's plant, which would require an expenditure of several hundred thousand dollars in lease purchases, development and pipe lines to acquire and operate in order to supply the requirements of appellant; that the only available wells in reasonable proximity of appellant's plant,

to which it can look to supply its requirements, are the wells now owned by it and under contract with it, including said fourteen wells classified by the Commission as sweet gas wells. (R. 11-12, 59-60.)

That such gas in the Panhandle field, including the gas produced from the wells connected to appellant's plant, contain approximately .35 of a gallon of gasoline per one thousand cubic feet (R. 2); that appellant has a market for the residue gas produced from said wells and that there will be no physical waste of the same; that there is no physical waste of gas from the time the same is produced from said wells connected with appellant's plant to the time that it is utilized by Combined Carbon Company in the manufacture of carbon black; that both the plant of appellant and that of Combined Carbon Company are constructed of the latest improved machinery and equipment and the latest and most up-to-date methods and processes are employed therein for the extraction of the gasoline content from said gas and the manufacture of carbon black therefrom. That the production of carbon black is a useful and necessary commodity, upon which the wellbeing of the public generally must depend, and that in the manufacture of carbon black there is no waste of gas and in such manufacture the heat units contained in such gas are actually utilized and applied in the manufacture of such product, and are not wasted and destroyed. (R. 12, 13, 62.)

That if the provisions of said act, and the orders of the Railroad Commission promulgated in pursuance thereto, be enforced against appellant it will be denied

the right to take sufficient gas from its wells to fulfill the requirements of Combined Carbon Company as it is required to do under its contract with said company. That its contract with Combined Carbon Company will be subjected to possible cancellation, and its casinghead gas contracts covering the leases and wells located thereon, so classified by the Commission as sweet gas wells, will become lost and destroyed and subjected to cancellation and forfeiture by the owners of such leases and wells; that by reason of the constant migration of the sweet gas into the sour area, with the resultant denuding of the sour gas, appellant, before long, will be denied the right to use any gas for processing in its gasoline plant and delivering the residue for carbon black manufacture from its remaining wells now classified as sour, and in such event appellant will be compelled to cease its operations and close down its plants, as a result of all of which appellant will suffer a total loss of hundreds of thousands of dollars. (R. 11-12, 27, 59-60.)

That there is no market or use for the gas from said wells connected with appellant's plant, classified by the Commission as sweet gas wells, for the purposes authorized by said act, and that the only use and market for the gas capable of being produced from said wells is to appellant's gasoline plant, or other operators of gasoline plants in such vicinity, with the residue going to carbon black manufacture. (R. 14, 59-60.)

Appellant says that the provisions of said act, insofar as they attempt to distinguish between sweet and sour gas and to restrict and limit sweet gas for specific pur-

poses, as in said act mentioned, and to prohibit the use of sweet gas for the manufacture of carbon black, and particularly subdivisions (g) and (h) of Section 2, subdivision (j) of Section 3, and subdivision (1) of Section 7, are invalid and unconstitutional in their application to appellant and its properties, for the reason that there is no fact justification for such provisions of said act, but the same are purely arbitrary and unreasonable; that the same have no reasonable relation to the prevention of waste or conservation of gas; that in fact there is no waste of gas in the manufacture of carbon black. (R. 10-11.) That the enforcement of the provisions of said act against appellant and its properties:

(a) Will compel appellant to shut in its wells so classified as sweet gas wells, for which appellant is not afforded a market or any reasonable hope for a market in the future from such wells for the uses of sweet gas as authorized by such act, which gas will be drained and drawn on the one hand by the pipe line companies who control the market for light and fuel purposes, and on the other hand by the sour gas wells, and the same will amount to the taking of appellant's property without due process in violation of the Fourteenth Amendment to the Constitution of the United States and Section 19, Article I of the Constitution of Texas. (R. 14-17, 19-21.)

(b) Will amount to the taking of appellant's property by law and dedicating and appropriating the same for a purported public use without compensation, and without appellant's consent, in violation of Section 17, Article I of the Constitution of Texas. (R. 17, 19-21.)

(c) Will unreasonably discriminate between appellant and others similarly situated who own wells classified as sour, adjacent to and in the vicinity of appellant's property, from which adjoining wells appellant's gas will be drawn and drained and utilized for the very purpose that appellant is denied the right to so utilize its gas, and appellant is therefore denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 19-21, 60-61.)

(d) Will discriminate between the users of sweet gas for fuel purposes in that it denies appellant the right to use sweet gas for the manufacture of carbon black, when as a matter of fact in such manufacture fuel is necessary to generate heat, and all of the heat units contained in the gas used in such manufacture are actually utilized and applied for the purpose of generating heat necessary to such manufacture, and therefore is violative of the equal protection clause of the Fourteenth Amendment to the Constitution of the United States. (R. 62.)

(e) Will impair the obligation of appellant's contract with Combined Carbon Company and the owners of various leases upon which are located the wells connected with appellant's plant, in violation of Section 10, Article I of the Constitution of the United States and Section 16, Article I of the Constitution of Texas. (R. 61-62.)

Appellant in its bill complained of the proration provisions of said act, but upon the trial of the case in the District Court abandoned its cause of action insofar as it complained of such proration of production pro-

visions of said act and offered no proof thereon, and there is only involved in this appeal the validity of the provisions of said act distinguishing between and classifying sweet and sour gas, and the prohibition of the use of sweet gas for the manufacture of carbon black, as applied to appellant and its properties.

The statutorily convened Three Judge Court, composed of Judge Robt. J. McMillan, District Judge for the Western District of Texas; Judge Jas. C. Hutcheson, Jr., Circuit Judge of the Fifth Circuit, and Judge Thomas M. Kennerly, District Judge for the Southern District of Texas, denied the injunctive relief sought, holding, in effect, that it was unable to find that the legislative classifications were arbitrary, unreasonable and without substantial basis of fact (R. 110); that there was abundance of factual support for the legislative prohibition against the burning of sweet gas for carbon black, and for that reason reached the conclusion that such provisions have and bear a reasonable relation to the conservation of the natural resources of the state. (R. 109-110.)

SPECIFICATIONS OF ERRORS TO BE URGED

1. The court erred in entering judgment and decree in this cause denying and refusing appellant's application and prayer for permanent injunction against the appellees and taxing the costs against appellant. (R. 113-114-I.)

2. The court erred in denying and refusing appellant's application and prayer for injunction, for the reason

that in Texas the Legislature has authority under its police power, or by virtue of Article 17, Section 59a of the Constitution of Texas, to regulate the production and use of the natural resources of the state only to the extent to prevent physical waste thereof, and under the record in this case it is conclusively established that there is no physical waste of gas, either underground or overground, in appellant's operation, and that the complained of provisions of said statute and the orders of the Railroad Commission promulgated thereunder, have no reasonable relation to the purposes sought to be accomplished thereby, but the same are purely arbitrary and their enforcement would be an unreasonable interference with appellant's property and property rights, and violative of the Fourteenth Amendment to the Constitution of the United States. (R. 116-XI.)

3. The court erred in its conclusion of law contained in Paragraph 5 of its Conclusions of Law filed herein, in that: "As a matter of marshaling the natural resources of the state the Legislature has the power, when one resource is fitted for two uses, and another resource for only one use, to classify those natural resources as to the use to be made of them, both for the purpose of preventing waste and for the protection of 'correlative rights';" for the reason that in Texas the Legislature is powerless, whether acting under its police power or under Article 17, Section 59a, to pass any law attempting to regulate the production and use of gas solely for the protection of correlative rights and irrespective of preventing physical waste. (R. 120-121-XX.)

4. The court erred in holding that the provisions of the statute complained of bear a reasonable relationship to the prevention of waste and conservation of the natural resources of the State of Texas, and constitute no unreasonable interference with or confiscation of appellant's property. (R. 114-II.)

5. The court erred in holding that the legislative classification of and distinction between sweet and sour gas is valid, when as a matter of fact, there is no basic difference between sweet and sour gas, their B.T.U. content and carbon black productivity being the same, and that such provisions of the statute in their application to the Panhandle gas field, where appellant's properties are located, under the record in this case, bear no reasonable relation to the purposes sought to be accomplish thereby, and said classification is therefore discriminatory against appellant and its properties. (R. 115-VIII.)

6. The court erred in holding that the use of sweet gas for the manufacture of carbon black constitutes waste, when as a matter of fact, under the record in this case, it is predominately established that there is no physical waste of gas where the same is used in the manufacture of carbon black. (R. 115-116-IX.)

7. The court erred in holding that the State of Texas, in the conservation of its natural resources, has the power to consider the uses to which those resources are most appropriately adapted and dedicate sweet gas for the restricted use of light and fuel, and prohibit the use of such gas for the manufacture of carbon black, although

the result thereof may destroy appellant's properties, where the record conclusively establishes that there is no physical waste of gas in the utilization of the same for the manufacture of carbon black in the plant of Combined Carbon Company, with whom appellant is under contract to furnish its requirements. (R. 115-VI.)

8. The court erred in arriving at the following conclusion in Paragraph 4 of its Conclusions of Law filed herein, as follows: "We find an abundance of factual support for the legislative prohibition against the burning of sweet gas for carbon black set out in House Bill 266, here under attack, and for that reason reach the conclusion that such provisions have and bear a reasonable relation to the conservation of the natural resources of the state", for the reason that the record in this case conclusively establishes that in the manufacture of carbon black there is no physical waste of gas and that there was no basis of fact for such legislative prohibition, and the provisions of the statute under attack are therefore arbitrary, unreasonable, and their enforcement would constitute an unreasonable interference with the rights of private property. (R. 120-XIX.)

9. The court erred in making the following finding of fact contained in Paragraph 12 of the Findings of Fact filed herein: "Probably as much as 30 pounds of carbon can be recovered from one thousand cubic feet of gas by other processes than the channel process", for the reason that such finding is not supported by the evidence. (R. 120-XVIII.)

10. The court erred in not holding that the enforcement of the provisions of said statute complained of, and the orders of the Railroad Commission promulgated thereunder against the appellant and its properties, will not only deny to appellant the right to reasonably use its said property for lawful purposes, without physical waste thereof, but will absolutely destroy such property, in that such act and order dedicates the same to a use for which there is no outlet or market afforded to appellant, and thus the same amounts to the taking of appellant's property without due process, in violation of the Fourteenth Amendment to the Federal Constitution. (R. 116-XII.)

11. The court erred in holding that the provisions of the statute complained of do not unlawfully discriminate between the owners of sweet and sour gas, and that the definition and classification of sweet and sour gas and the specified uses therefor as contained in said statute are based upon fact foundation and are accordingly valid. (R. 114-III.)

12. The court erred in not holding that the enforcement of the provisions of said statute, and the orders of the Railroad Commission against appellant and its property, will discriminate between appellant and others of the same class and similarly situated, in that it denies to appellant the right to use its said property for the manufacture of carbon black, whereas it permits appellant's neighbors, engaged in the same character of business, to use the same character of property for the manufacture of carbon black and takes and appro-

priates appellant's property for a specific and restricted use and for which appellant is denied any outlet, and thus appellant is denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States. (R. 117-XIII.)

13. The court erred in not holding that the provisions of said statute, and the orders of the Railroad Commission authorizing the use of sweet gas for fuel purposes, discriminates against appellant and its said properties in favor of others who are permitted under said statute and orders to use gas for fuel purposes, whatever the necessity for such use may be, in that it denies the use of sweet gas for the manufacture of carbon black, when as a matter of fact conclusively established by the record, all the heat units contained in such gas are actually utilized and applied in such manufacture for the purpose of generating heat in order to break down the chemical constituents of said gas and separate the carbon black from the other elements contained therein. (R. 117-XIV.)

14. The court erred in holding that the operation of the statute as to appellant and its property does not impair the obligation of appellant's contract with Combined Carbon Company and various owners of leases with whom appellant is under contract to take gas from their wells, and that the enforcement of said statute is not in violation of Article I, Section 16 of the Constitution of the State of Texas. (R. 114-IV.)

15. The court erred in its Conclusions of Law from the facts as found by the court as set out in its Findings

of Fact and Conclusions of Law filed by the court in this cause, for the reason that the facts found by the court do not afford a basis for the Conclusions of Law made. (R. 121-XXI.)

16. The court erred in failing to differentiate this case from the case of Walls v. Midland Carbon Company, 254 U. S. 300, and in citing said case of Walls v. Midland Carbon Company as authority for its decision in this case, for the following reasons: (a) That the rule of property in Texas is different from the rule of property in Wyoming. (b) That the facts in this case are entirely different from the facts in the case of Walls v. Midland Carbon Company. (R. 115-VII.)

SUMMARY OF ARGUMENT

The act and orders under attack are such that the Court has power to make inquiry of and to determine, as a matter of law, whether or not such act and orders, made in pursuance thereto, bear a reasonable relation to the purposes sought to be accomplished by such act and orders.

The Legislature of Texas has no power to regulate the production and use of natural gas except only to prevent waste thereof.

Under the facts in evidence it is conclusively established that the provisions of the act complained of and the orders of the Railroad Commission promulgated in pursuance thereto, bear no reasonable relation to the purpose sought to be accomplished thereby; that there is no fact basis for such part of said act upon the part

of the Legislature of Texas, and the same is purely arbitrary and unreasonable as applied to the Panhandle gas field where appellant's properties are situated, for the following reasons:

(a) There is no distinction between sweet and sour gas, their B.T.U. content and carbon black productivity being the same, the only point of difference being that sour gas contains hydrogen sulphide which can be eliminated by processing at a comparatively small cost. Therefore, the difference is only commercial and is insufficient to sustain the classification.

(b) The Panhandle field is underlaid by a single, interconnected common reservoir containing both sweet and sour gas, between which there is no structural barrier, and such gas will migrate from one portion of the field to another, depending upon pressure conditions prevailing, and withdrawal from one portion of the field, whether in the sweet or sour area, will affect the ultimate recovery from the balance of the reservoir. The statute complained of authorizes withdrawals from the sour and sweet areas to the extent of the respective market demands for carbon black manufacture and light and fuel use. Therefore it is immaterial, so far as the ultimate recovery of gas from the reservoir is concerned, whether gas utilized for carbon black manufacture be produced from one portion of the reservoir or from over the reservoir generally.

(c) The classification has no relation to the conservation of sweet gas for the purposes for which the statute authorizes the same to be utilized, for the rock pressure

in the sour gas area is greatly lower than the rock pressure in the sweet gas area, and sweet gas is constantly migrating into the sour area. The statute authorizes withdrawals from the respective areas to the extent of the market requirements for carbon black manufacture and light and fuel use. The evidence shows that under the operation of the act the ratio of withdrawals will be more than two to one greater in the sour area than in the sweet area. Hence, the present migration of sweet gas into the sour area will be accentuated under the operation of the act.

(d) There is in fact no waste of gas when the same is utilized in the manufacture of carbon black.

(e) There is no physical waste of gas in appellant's operations.

That the enforcement of the provisions of said act complained of, and the orders of the Railroad Commission promulgated thereunder, against appellant and its properties will not only deny to appellant the right to the reasonable use of its property for useful and necessary purposes without physical waste thereof, but will destroy such property, in that such act and orders dedicate and restrict the same to a use for which there is no outlet or market afforded appellant, and thus the same amounts to the taking of appellant's property without due process in violation of the Fourteenth Amendment to the Constitution of the United States.

That the enforcement of the complained of provisions of said act and orders of the Railroad Commission

against appellant and its properties will discriminate between appellant and others of the same class and similarly situated, in that they will deny appellant the right to use its gas, classified by the Commission as sweet gas, in the manufacture of carbon black, and purport to dedicate and conserve such gas for the uses for which the act authorizes sweet gas to be utilized, but for such uses appellant is afforded no market or outlet, and such gas, in fact, will be drained and drawn to the sour gas producing wells and there produced and appropriated by others and used by them for the manufacture of carbon black, and thus, appellant is denied the equal protection of the law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

That the enforcement of the complained of provisions of said act, and the orders of the Railroad Commission promulgated thereunder, authorizing the use of sweet gas for fuel purposes but prohibiting the use of such gas in the manufacture of carbon black, will discriminate against appellant and its property in favor of others who are permitted, under said act and order, to use gas for fuel purposes, regardless of the character of manufacturing business in which they may be engaged, and regardless of the character of the product manufactured, its relative value or public good, for the reason that in the manufacture of carbon black fuel is necessary and required to generate heat in order to break down the chemical constituents of the gas and separate the carbon black from the other elements contained therein, and

in such manufacture all of the heat units contained in the gas so used are actually applied and utilized for generating heat, which is necessary and required in such manufacturing process. Thus, appellant and its properties are denied the equal protection of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The holding of this court in Walls v. Midland Carbon Company has no application to the issues presented here, for the reasons that:

(a) The rule of property in Wyoming is different from the rule of property in Texas; and,

(b) The facts in this case are entirely different from the facts in that case.

ARGUMENT

I.

The Act Under Attack Is Such That the Court Has Power to Make Inquiry of, and to Determine, as a Matter of Law, Whether or Not Such Act and the Orders of the Commission, Made in Pursuance Thereto, Bear a Reasonable Relation to the Purposes Sought to Be Accomplished by Such Act and Orders.

The act under attack here is not the final conclusion of the Legislature of Texas on a political question, thereby foreclosing to the courts the right to inquire into the facts upon which such legislative act is based or can be presumed to have been based. The act is a creature of the police power of the state, and where an act of the Legislature, passed under the authority of its police power, comes into conflict with the exercise and enjoy-

ment of the private rights of the citizens of the state, which are guaranteed by both the state and federal constitutions, the courts may inquire into the reasonableness of the exercise of such power. The Legislature cannot exercise its police power except where the interest of the public welfare demands. There is a limit to such power and such limit is reached when the act transcends the public necessity, and the police power is paramount only to private rights to the extent that public necessity requires its exercise. This, of course, presents a question of fact, and unless the court has the power to inquire into the fact justification of such act, when such act of the Legislature is challenged by the citizen on the ground that the enforcement of the same would be violative of his constitutional rights, then the constitutional guarantees to the private citizen and his property would be meaningless, as it would be within the power of the Legislature to destroy the protection of the constitution to the citizen.

Therefore, where a statute, enacted under the authority of the police power of the state, is challenged as being in conflict with and violative of the private rights of a citizen, guaranteed to him by the federal and state constitutions, the courts will investigate the facts and determine whether there is any reasonable fact basis for the legislative act, or whether, as sought to be applied to a particular situation, it is invalid. There must be some reasonable relation between the act and the purposes it purports to accomplish, and such relation must be either shown by facts of which the court will take

judicial notice, or by substantial testimony, or by a reasonable deduction from the facts. Otherwise, the legislative act will not be sustained.

In *Dobbins v. Los Angeles*, 195 U. S. 223, 49 L. Ed. 169, it was sought to sustain an ordinance prohibiting the erection or maintenance of gas works except within the prescribed limits in the city of Los Angeles. It was alleged by plaintiff that numerous other enterprises were located in the same area having characteristics as distasteful as those of a gas plant, and that the ordinance was unreasonable. This court held that the petition stated a cause of action, and in so holding, said:

> "It is now thoroughly well settled by the decisions of this court that municipal by-laws and ordinances and even legislative enactments undertaking to regulate useful business enterprises, are subject to investigation in the courts with a view to determining whether the law or ordinance is a lawful exercise of the police power, or whether, under the guise of enforcing police regulations, there has been an unwarranted and arbitrary interference with the constitutional right to carry on a lawful business to make contracts or to use and enjoy property."

In *Meyer v. Nebraska*, 262 U. S. 390, 67 L. Ed. 1042, this court struck down a statute of the State of Nebraska, which required that language other than the English language could be taught in the various schools of that city only after a child should have successfully passed the eighth grade. It is to be noted that even the Supreme Court of Nebraska (which evidently should be classed as reasonably minded) found that there was a salutary purpose in this statute and that it had a reasonable rela-

tion to the police power of the state. This Court, however, felt required to investigate this question itself, regardless of the findings of the Legislature, and regardless of the findings of the State Supreme Court, and said:

> "Determination by the Legislature of what constitutes proper exercise of police power is not final or conclusive, but is subject to investigation by the courts."

In *Burns Baking Co. v. Bryan*, 264 U. S. 504, 68 L. Ed. 813, this Court held:

> "Constitutional protection having been invoked, it is the *duty of the court*[1] to determine whether the challenged provision has reasonable relation to the protection of purchasers of bread against fraud by short weight and really does then accomplish the purpose for which it was enacted."

The court thereupon examined the evidence in the record and concluded after such examination that the necessary reasonable relation did not exist and that the statute was therefore invalid.

In *Fairmount Creamery Co. v. State of Minnesota*, 274 U. S. 171, 71 L. Ed. 893, a statute of Minnesota which forbade creameries purchasing cream at higher prices in one locality than in other localities was held invalid because it had no substantial relation to any matter relating to police power.

Referring to several cases cited by the State, this court said:

> "But all those cases recognize the duty of the court to inquire into the real effect of any statute duly

[1] Italics ours.

> challenged because of interference with freedom of contract guaranteed by the Fourteenth Amendment, and to declare it invalid when without substantial relation to some evil within the power of the State to suppress, and a clear infringement of private rights."

The right of the Court to pass on fact issues in connection with a statute is recognized by Mr. Justice Brandeis in the recent opinion in *N. C. & S. Ry. Co. v. Walters*, 294 U. S. 405, 79 L. Ed. 458. That case concerned the validity of a statute of Tennessee requiring that railroad companies pay a certain percentage of the expense of underpasses. It was held that the State court had erred in refusing to consider the facts presented as showing that there was no fact basis for any assumption that this underpass was for the benefit of the public at large.

Although taken from the dissenting opinion of Mr. Justice McReynolds, concurred in by Justices Van Deventer, Sutherland and Butler, we think the paragraph hereinafter quoted from *Nebbia v. New York*, 291 U. S. 502, 78 L. Ed. 940, is very pertinent. We do not understand that the court divided over whether that paragraph was an improper statement of the rule. As we understand both opinions, that was recognized to correctly state the rule; but the members of the court differed on whether the facts of which they could take judicial notice, taken in connection with the facts disclosed

from the record, were sufficient to show the statute invalid. The paragraph referred to is as follows:

> "If validity of the enactment depends upon emergency, then to sustain this conviction we must be able to affirm that an adequate one has been shown by competent evidence of essential facts. The asserted right is Federal. Such rights demand and often have received affirmation and protection here. *They do not vanish simply because the power of the State is arrayed against them, nor are they enjoyed in subjection to mere legislative findings.*[1] If she relied upon the existence of emergency, the burden was upon the State to establish it by competent evidence."

In *Weaver v. Palmer*, 270 U. S. 402, 70 L. Ed. 654, the decision concerned the validity of a statute which, among other things, prohibited the use of shoddy in the making of mattresses, pillows, etc. The statute was held invalid because there was no evidence showing that the prohibition had any reasonable relation to the protection of health or any other result within the proper domain of police power. This court, among other things, said:

> "The question for decision is whether the provision purporting absolutely to forbid the use of shoddy in comfortables violates the due process clause. The answer depends upon the facts of the case. Legislative determinations, express or implied, are entitled to great weight; but it is always open to interested parties to show that the Legislature has transgressed the limits of its power. Invalidity may be shown by things which will be judicially noticed or by facts established by evidence. The burden is on the attacking party to establish the invalidating facts."

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[1] Italics ours.

In *Lawton v. Steele*, 152 U. S. 133, 38 L. Ed. 385, 14 Sup. Ct. 499, Mr. Justice Brown, speaking for the Court, said:

> "To justify the state in thus interposing its authority in behalf of the public, it must appear, first that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The Legislature may not, under the guise of protecting the public interest, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations. In other words, its determination as to what is the proper exercise of its police powers is not final or conclusive, *but is subject to the supervision of the courts.*"[1]

In *Holden v. Hardy*, 169 U. S. 366, L. Ed. 42, 780, 18 Sup. Ct. 383, the Court said:

> "But the exercise of the police power is subject to judicial review, and property rights cannot be wrongfully destroyed by arbitrary enactment."

In *Crowell v. Benson*, 285 U. S. 22, 76 L. Ed. 598, the Court said:

> "In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and of law, necessary to the performance of that supreme function. The case of confiscation is illustrative—the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to a fair opportunity for submitting that

[1] Italics ours.

issue to a judicial tribunal for a determination upon its own independent judgment as to both law and facts (citing Ben Avon case and others)."

In *St. Joseph Stockyards Co. v. United States*, 80 L. Ed. 679, decided April 27, 1936, this court once more announced the rule, when it said:

"But the Constitution fixes limits to the rate-making power by prohibiting the deprivation of property without due process of law or the taking of private property for public use without just compensation. When the legislature acts directly, its action is subject to judicial scrutiny and determination in order to prevent the transgression of these limits of power. The legislature cannot preclude that scrutiny or determination by any declaration or legislative finding. Legislative declaration or finding is necessarily subject to independent judicial review upon the facts and the law by courts of competent jurisdiction to the end that the Constitution as the supreme law of the land may be maintained."

In *Houston & T. C. Ry. Co. v. City of Dallas*, 98 Tex. 396, 70 L. R. A. 850, 84 S. W. 648, the Court, speaking of the police power of the state, said:

"The power is not an arbitrary one, but has its limitations. It is commensurate with, but does not exceed the duty to provide for the real needs of the people in their health, safety, comfort and convenience, as consistently as may be with private property rights. As those needs are extensive, various and indefinite, the power to deal with them is likewise broad, indefinite and impracticable of precise definition or limitation. But, as the citizen cannot be deprived of his property without due process of law, and as a privation by force of the police power ful-

fills this requirement only when the power is exercised for the purpose of accomplishing and in a manner appropriate to the accomplishment of the purposes for which it exists, it may often become necessary for courts, having proper regard to the constitutional safeguard referred to in favor of the citizen, to inquire as to the existence of the facts upon which a given exercise of the power rests, and into the manner of its exercise; and if there has been an invasion of property rights, under the guise of this power, without justifying occasion, or in an unreasonable, arbitrary and oppressive way, to give to the injured party that protection which the Constitution secures. *It is, therefore, not true, as urged by the plaintiff, that the judgment of the legislative body concludes all inquiry as to the existence of facts essential to support the assertion of such a power as that now in question.*[1] If this were true, it would always be within the legislative power to destroy the constitutional provisions giving protection to the individual."

Further on in the opinion, the court has this to say:

"The position is taken that the question as to reasonableness is one of law for the court and not a fact to be decided upon a hearing of evidence, from which the conclusion is urged that the trial court, when hearing exceptions, properly held the ordinance to be valid. It is doubtless true that the question is one of law. The reasonableness or unreasonableness of many ordinances will appear on their faces, and the court may, upon mere inspection, pronounce them to be valid or invalid. In others the question may depend upon their operation upon particular persons, or conditions of fact which cannot be known to the court until made to appear by evidence. Their effect may be just and reasonable in general, but in particular instances may be arbitrary and oppres-

[1]Italics ours.

sive to the extent of invading fundamental rights (citing cases). In such cases the court can only determine as to the validity or invalidity of the ordinance when the facts upon which the question depends are established."

II.

The Court Erred in Refusing Appellant's Application for Permanent Injunction.

1. THE LEGISLATURE OF TEXAS HAS NO POWER TO REGULATE THE PRODUCTION AND USE OF NATURAL GAS EXCEPT ONLY TO PREVENT WASTE THEREOF.

With reference to the fourteen wells, and the leases upon which the same are located, which wells have been classified by the Railroad Commission as sweet gas wells, the evidence shows that the appellant is the owner of four of such wells located upon three different leases; that as to the remaining ten wells, appellant owns casinghead gas contracts thereon, in substantial form and substance as shown by Exhibit 3. (R. 219.) That by virtue of such casinghead gas contracts appellant has become vested with an interest in the land covered by the leases upon which such wells are located.

Amer. Ref. Co. v. Tidal-Western Oil Co., 264 S. W. 335, (writ ref.).

The State of Texas, by Article 14, Section 7 of the Constitution of Texas, released to the owners of the surface all oil, gas and minerals in and under the same, and reserved only the right to tax such minerals. By the decisions of the Supreme Court, subsequent to the adoption of the Constitution, which decisions have become a

rule of property in this State, it has been uniformly held that the owner of the surface is the absolute owner in fee of the oil and gas in and under the boundaries of his land and that he has the absolute right to drill wells thereon to capture the oil and gas in and under his land, and when once reduced to his possession, he is the absolute owner thereof, even though a portion of such oil or gas may have come from the land of his neighbor, by reason of its fugitive character. Under the property rules in force in some states the owner of the surface has no title to the oil and gas in place but only a right to acquire title upon reducing the minerals to possession. In Indiana, the rule is that the owner, although entitled to bore wells for natural gas and oil, has no title to those substances as owner until they are actually reduced by him to possession. The same rule prevails in Wyoming and Oklahoma. In Louisiana, the rule seems to be that the minerals cannot be severed from the soil except by permission of the state. Texas, however, has never recognized such limited ownership because the Constitution relinquished the minerals to the owners of the soil, and from the time the question was first raised it has been uniformly held that the landowner holds absolute title to the oil and gas in place as well as the oil and gas which migrates to formations underlying his lands through drainage from other lands.

H. & T. C. Ry. Co. v. East, 81 S. W. 279;
Bender v. Brooks, 127 S. W. 168;
Texas Co. v. Daugherty, 176 S. W. 717;
Gillette v. Mitchell, 214 S. W. 619;

Stephens Co. v. Mid-Kansas Oil & Gas Co., 254 S. W. 290;

Brown, et al v. Humble Oil & Ref. Co., 83 S. W. (2d) 935.

In *Brown, et al v. Humble Oil & Refining Company*, supra, recently decided by the Supreme Court of Texas, the court said:

> "The rule in Texas recognizes the ownership of oil and gas in place and gives to the lessee a determinable fee therein, LaMarr v. Garner, 121 Tex. 502, 50 S. W. (2d) 769; Humphreys-Mexia Co. v. Gammon, 113 Tex. 247, 254 S. W. 296; Waggoner Estate v. Sigler Oil Co., 118 Tex. 509; 19 S. W. (2d) 27; The Texas Co. v. Daugherty, 107 Tex. 226, 176 S. W. 717, L. R. A. 1917F, 989.
>
> "Owing to the peculiar characteristics of oil and gas, the foregoing rule of ownership of oil and gas in place should be considered in connection with the law of capture. This rule gives the right to produce all of the oil and gas that will flow out of the well on one's land; and this is a property right. And it is limited only by the physical possibility of the adjoining land owner diminishing the oil and gas under one's land by the exercise of the same right of capture."

Later on in its opinion, the court further said:

> "Each person owns the oil and gas in place under his land and each still has the right to possession, use, enjoyment and ownership, of the oil and gas produced through wells located on his land, regardless of its origin."

The act under attack here has not changed the above rule of property in Texas.

The State of Texas, however, under its police power, has the right to regulate the production of its natural resources so as to prevent their waste. But this is as far as it can go and such regulation must be reasonable, based upon fact, founded in public necessity and not arbitrary.

The following decisions of courts in Texas hold, in legal effect, that there can be no valid regulation of the production of oil or gas in the absence of physical waste.

McMillan v. R. R. Com., 51 Fed. (2d) 400;

F. C. Henderson, Inc. v. R. R. Com., 56 Fed. (2d) 218;

Danciger Oil & Ref. Co. v. R. R. Com., 49 S. W. (2d) 837, 842; 56 S. W. (2d) 1075 (C. C. A.);

Peoples Pet. Producers Co. v. Sterling, 60 Fed. (2d) 1041;

Peoples Pet. Producers Co. v. Smith, 1 Fed. (Supp.) 361;

Canadian River Gas Co. v. Terrell, 4 Fed. (Supp.) 222.

We believe that no case can be found, from a court sitting in Texas, upholding attempted regulation where there was no evidence of physical waste.

We, therefore, contend that under the rule of property in this state appellant has the right to reasonably use its property for legitimate and useful purposes so long as it is not creating any actual physical waste of the same in its use thereof.

2. THE COMPLAINED OF PROVISIONS OF THE STATUTE BEAR NO REASONABLE RELATION TO THE OBJECT SOUGHT TO BE ACCOMPLISHED THEREBY, WHEN APPLIED TO THE PANHANDLE GAS RESERVOIR WHERE APPELLANT'S PROPERTIES ARE SITUATED.

(a) There is no fact justification for the classification between sweet and sour gas.

If we be correct in our contention that the Legislature of Texas can only regulate the production and use of the natural resources of the state for the purpose of conserving the same and preventing waste thereof, then it follows that the only lawful purpose sought to be accomplished by the act is the prevention of physical waste of gas. This is made clear by the "Declaration of Policy" contained in the act, which is as follows:

> "Section 1. Declaration of Policy: In recognition of past, present, and imminent evils occurring in the production and use of natural gas as a result of waste in the production and use thereof, in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production."

Appellant's attack is centered upon those provisions of said act which classify sweet and sour gas and declare that the use of sweet gas for the manufacture of carbon black from a gas well shall constitute waste, and therefore prohibit the use of sweet gas in the manufacture of

carbon black.[1] Obviously, if, as a matter of fact, the manufacture of carbon black from sweet gas is not a physical waste of such gas, then the complained of pro-

[1]"Sec. 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article, to-wit: * * *

"(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half grains of hydrogen sulphide per one hundred cubic feet or more than thirty grains of total sulphur per one hundred cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes.

"(h) The term 'sweet gas' shall mean all natural gas except 'sour gas' and 'casinghead gas'.

"(i) The term 'casinghead gas' shall mean any gas and/or vapor indigenous to an oil stratum and produced from such stratum with oil.

"(j) The term 'natural gasoline' shall apply to gasoline manufactured from casinghead or from any natural gas.

"Section 3. The production, transportation or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste', among other things, shall specifically include: * * *

"(j) The use of sweet gas produced from a gas well for the manufacture of carbon black. * * *

"Sec. 7. After the expiration of ten days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

"(1) No sweet gas shall be utilized except for:

(a) Light or fuel.

(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

(c) Bona fide introduction of gas into oil or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

"(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes, including the manufacture of carbon black, provided it is utilized in a plant producing a recovery of not less than one pound of carbon black to each thousand cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black."

visions of said act have no reasonable relation to the purposes sought to be accomplished thereby, but are purely arbitrary and capricious and must be stricken down.

The District Court concluded:

(1) That the classification between sweet and sour gas as contained in the act is not arbitrary or unreasonable.

(2) That there was factual support for the legislative prohibition against the burning of sweet gas for carbon black, and for that reason reached the conclusion that the complained of provisions of said act have and bear a reasonable relation to the conservation of the natural resources of the state.

Appellant challenges these conclusions of the court as not being warranted or supported by the facts in the record and have properly assigned the same as error committed by the District Court. (R. 121.)

It is appellant's contention that the record in this case overwhelmingly and preponderantly shows that there is no basis in fact for the legislative classification and distinction between sweet and sour gas and the authorized uses therefor, as applied to the Panhandle field, and that such provisions of said act are purely arbitrary and unreasonable.

Appellant has shown by the uncontradicted testimony of the witnesses, Hughes, Thompson and Massa, all geologists and gas engineers with unquestioned qualifica-

tions, that the Panhandle gas field is the largest known gas field in the world; that the western portion of such field, designated as the West Panhandle field, in which the properties of appellant are situated, comprises approximately one million acres, with less than one-third of this portion of the field containing sour gas, being gas containing varying degrees of hydrogen sulphide, and more than two-thirds of said portion of said field containing what is known as sweet gas, being gas containing less than one and one-half grains of hydrogen sulphide per one hundred cubic feet; that the Panhandle field is underlaid by one common reservoir and that there is no structural barrier between the sweet and sour areas; that the gas bearing formation is such that the gas contained in said reservoir will migrate from the areas of high pressure to areas of lower pressure; that the original rock pressure of said reservoir was 430 pounds and that such pressure was uniform over the entire reservoir; that due to intense oil development, and the production of oil from the various oil pools, which happened to be located in the sour gas area, and the consequent production of large quantities of gas through wells that were being drilled for oil, and the consequent withdrawal of large quantities of gas in the oil pools, as an incident to the production of oil, the average pressure condition in the sour gas area is much lower than the average pressure prevailing in the sweet gas area, this pressure differential being approximately 94 pounds; that by reason of this existing condition gas from the higher sweet areas is constantly migrating into the lower sour areas, and that this migration of sweet gas

into the sour will continue so long as a lower pressure condition prevails in the sour gas area. (R. 136-140, 149-152, 154, 156-159.) There has already been a migration of sweet gas into the sour area in an amount that would equal approximately one-half of the sour area in place as originally contained in said reservoir. (R. 143-149.)

The District Court found as a fact:

> "While the field is apparently a common reservoir, there is a line of demarcation which fairly separates the sour gas area from the sweet gas area. Accordingly, as a general thing the pressures in the sour gas area are lower than those in the sweet gas area. Lowering the pressure tends to cause migration from higher pressure areas to lower pressure areas, but the length of time which it takes to accomplish this is not known." (R. 99.)

The inescapable deduction from these facts is that nothing is acomplished by requiring the carbon black industry to operate exclusively in the sour area, for it is immaterial whether withdrawal of gas may be made through a sour gas well or through a sweet gas well, so far as the ultimate recovery of gas from the common reservoir is concerned, and this evidence shows that if the carbon black industry is confined to the sour gas area that, as a matter of fact, it will utilize sweet gas produced through wells located in the sour gas area, in the manufacture of carbon black.

The District Court found as a fact:

> "The establishment of a line of distinction between sweet and sour gas at one and one-half grains

> of hydrogen sulphide per one hundred cubic feet is an apt point of division. * * * If all gas containing the slightest trace or more of hydrogen sulphide were classified as sour gas, a very appreciable volume of gas which could be taken into a pipe line without treatment would be used for carbon black manufacture; that the point of division of one and one-half grains of hydrogen sulphide per one hundred cubic feet increases the reserve of gas restricted to light and fuel purposes considerably, without increasing the concentration of hydrogen sulphide in the pipe lines to a point where their life would be shortened by corrosion or where the consumers will feel any disagreeable effects." (R. 105-106.)

These findings by the court, together with the further findings that sweet gas in its natural state, as defined in said act, is usable for carbon black and for light and fuel, whereas sour gas, as defined in said act, is usable for carbon black but not usable for light and fuel; that each has substantially the same B.T.U. content and equal carbon black productivity, but sour gas must undergo treatment before it can be put into pipe lines for industrial or domestic use (R. 106), constitute the substantial facts as contained in the court's finding, upon which the court reached the conclusion that the classification between sweet and sour gas was not arbitrary or unreasonable.

Obviously, these facts as found by the court do not warrant or sustain the conclusion reached to the effect that the classification is not arbitrary or unreasonable. This is true, for the facts show, and the court has correctly found, that there is no basic difference between sweet and sour gas, either as to their B.T.U. content or

carbon black productivity, the only distinction being that sour gas contains varying degrees of hydrogen sulphide, which can be eradicated at a cost not in excess of one-fourth cent per thousand cubic feet, and after the sulphide content in such gas has been so eradicated such gas is then as fit for light and fuel purposes as sweet gas entirely free from any trace of hydrogen sulphide in its natural state. (R. 162-164.) The testimony of the state's witnesses, Crowell and Patten, shows that the sulphur content can be eradicated from sour gas even at a less cost than one-fourth cent per thousand cubic feet. (R. 322, 290-291.)

There is no justification, however, for the finding of the court to the effect that the classification of sweet and sour gas increases the reserve of gas restricted to light and fuel purposes. We say this is not, and cannot be, a fact under the application of the statute in question to the Panhandle reservoir, for the reason that the statute authorizes withdrawals from the common reservoir to the extent of the respective market demands of the carbon black manufacturers and the users of gas for light and fuel purposes;[1] that in view of the fact that, as found by the court, the Panhandle field is underlaid by a common reservoir, that there is no structural barrier between the sweet and sour areas, and that the gas in such reservoir—whether sweet or sour—migrates from areas of higher pressure to the areas of lower pressure, and it is therefore immaterial, so far as the ultimate recovery of gas is concerned, whether the carbon black

[1]Sections 12, 13, 19.

demands be produced from one portion of the field or whether they be produced generally over the entire field, so long as withdrawals of gas in the reservoir are permitted to the extent of the market requirements of both the carbon black industry and the users for light and fuel purposes, which the statute in question authorizes.

Subdivision 1 of Section 7 of said act sets forth the uses for which sweet gas can be utilized and excepts from such uses the manufacture of carbon black. Subdivision 2 of said Section provides that sour gas may be used for *all* purposes for which sweet gas is authorized to be used, and in addition thereto sour gas may be used for the manufacture of carbon black. Does not the act, therefore, upon its face, show discrimination without fact justification? Did not the Legislature determine that there was in fact no distinction between sweet and sour gas for light and fuel purposes? The declaration by the Legislature that sour gas *may* be used for all the purposes for which sweet gas may be used, is tantamount to a finding by the Legislature that sour gas *can* be so used; and if it can be so used, then there is no basis for the distinction which the Legislature sought to apply. Thus, the statute carries its own death sentence.

The question of whether gas that contains more than one and one-half grains of hydrogen sulphide per one hundred cubic feet of gas is in fact fit and useful for fuel is not one of those questions that conceivably may be answered either way dependent upon a legitimate exercise of legislative discretion. It is purely factual in

its nature. And to accept as conclusive such legislative determination would be nothing short of abdication of the judicial function.

The record, we submit, drives irresistibly to the conclusion that the difference between sour gas as defined and sweet gas as defined, in respect to its fitness for light and fuel purposes, is purely commercial, a difference not exceeding one-fourth cent per thousand cubic feet in cost of processing. This means, simply, that, broadly speaking, the profit arising from the business of supplying sour gas, so defined, for light and fuel purposes, is about one-fourth cent less per thousand cubic feet than is the profit accruing from the business of supplying sweet gas.

All natural gas requires processing before it is fit for domestic fuel consumption. It is run into a gasoline extraction plant. That it be so processed is suggested by prudence, commercial advantage and the necessity of rendering the gas safe for such use. From sour gas it is necessary to extract not only the gasoline but also to extract the sulphur content. This process is not complicated but is simple and the cost relatively insignificant.

The process of removing the sulphur content from sour gas to render it suitable for domestic fuel is simpler and less expensive than the processes commonly in use in removing from municipal water supplies the foreign substances or impurities rendering water unfit for domestic use. Pure streams of water are occasionally found in natural reservoirs. Depending upon the natural condition of the water, the degree of freedom from foreign

substances, etc., the expense of purification varies. On that ground, however, the Legislature would have no right to require the owners of an arbitrarily defined pure water supply to confine it to domestic and *certain kinds* of industrial uses, while allowing to an unlimited extent the use for other industries of water supplies not within the arbitrary definition, but nevertheless suitable for domestic use after simple and inexpensive filtration or treatment.

If a man owned a water well, suppose the Legislature should say to him: "You may not use your water supply in the industry that you have developed at great expense, notwithstanding its dependence upon such supply for its existence." How could the Legislature so restrict his use of his property, the enjoyment of which is guaranteed to him by the Constitution, if at the same time the Legislature permits other owners to use their water supply (drawn from the same reservoir) for the same industry, the distinction being grounded in the insignificant fact that water coming from the latter's wells requires filtration or treating, in order to render it fit for domestic use or for use in other industries?

The Legislature had as well say that no man shall use for other than drinking purposes and industries of a given kind of water supply owned by him if, perchance, it is suitable for domestic purposes without treatment or filtration.

Sand or other foreign substances may be removed from the water by the simple process of filtering. The difference between supplying water that is impregnated

with sand, and water that has no sand content is, when practically considered, a commercial difference. This may have been otherwise in a former day when filtration and purification were undeveloped. But the Legislature may not shut its eyes to that which is everywhere known, and then require the application of the Constitution in a way that implies blindness to well established facts.

(b) The classification complained of, as applied to the Panhandle gas field and to appellant's properties, has no relation to the conservation of sweet gas for the purposes that the statute authorizes the same to be utilized for.

As before pointed out, the Panhandle field is underlaid by a common reservoir which produces both sweet and sour gas. There is no structural barrier between the sweet and sour areas and gas migrates from one portion of the field to the other, depending upon the pressure conditions; that withdrawal of gas either from the sweet or the sour area will affect the ultimate recovery of gas from the balance of the reservoir; that there is now prevailing a lower pressure condition in the sour area than in the sweet area and gas is now migrating from the sweet area of higher pressure to the sour gas area of lower pressure. The act does not provide for equal withdrawals from the two areas for the purposes of maintaining a uniform rock pressure but authorizes the Railroad Commission to zone such sweet and sour gas areas and specifically permits the withdrawals in such areas to be in proportion to their respective market demands. The sour gas area comprises less than one-third of the entire reservoir (R. 99), while the market

demand for carbon black manufacture practically equals the demand for light and fuel purposes. (R. 101.) The evidence shows that there has been a tremendous migration of sweet gas into the sour area in the past and even under the pressure conditions as they now exist in the reservoir, there is a tremendous migration of gas now taking place from the sweet area to the sour area, but this migration will be accentuated under the operation of the act for the very reason that the percentage of withdrawals in relation to the open flow capacity of all wells in the respective areas will be more than twice as great in the sour area than in the sweet area. (R. 143-149.) It is obvious that as long as the act authorizes the withdrawals to the extent of the market requirements of carbon black manufacture and light and fuel uses, there can be no conservation, by reason of the classification in question, of the gas classified as sweet for the purposes that the statute authorizes such gas to be utilized for.

(c) The classification complained of has no relation to the protection of the correlative opportunities of the various owners in the Panhandle Field by compelling ratable production.

As we have attempted to point out, the Legislature of Texas is powerless to pass any law regulating the production and use of natural gas save only to prevent waste thereof. This, we think, is the purpose of the statute in question, from the "Declaration of Policy" as set out under Section 1 of the act. But assuming, for the sake of argument, that one of the purposes of the statute was to protect the "correlative opportunities" of owners

of gas in the common reservoir by "compelling ratable production", as these terms appear in the declaration of policy, and, assuming for the sake of argument, that the Legislature has the power to regulate the production and use of gas for such purpose, irrespective of the prevention of waste, then we say that even in this event the classification complained of bears no relation to the purpose sought to be accomplished. If it be true that ratable production will tend to protect the correlative rights and opportunities of the owners in a common pool, then we say that the very classification between sweet and sour gas, considered in connection with the provisions of the statute authorizing withdrawals to the extent of the respective market demands of carbon black manufacturers and light and fuel users, causes unratable production rather than ratable production, for the evidence, as we have heretofore pointed out, conclusively establishes that, under the operation of the act, the rate of withdrawals in the sour area will be more than two times greater than the rate of withdrawals in the sweet area. Hence, the classification can have no relation to this purpose of the act, if, indeed, this be a purpose of the act. It is obvious that if ratable production be a purpose of the act then it is not necessary to make any classification between sweet and sour gas to accomplish ratable production.

(d) There is no physical waste of gas in the manufacture of carbon black.

Obviously, it is difficult for us to conceive why it should be necessary for appellant to assume the burden

of proof on the proposition that the use of sweet gas in the manufacture of carbon black does not constitute waste, when the very statute provides that the use of sour gas in the manufacture of carbon black (although both of such characters of gas may be produced from the same common reservoir) does not constitute waste when there is in fact no distinction between sweet and sour gas. It has occurred to us that the legislative finding to the effect that the use of sour gas for the manufacture of carbon black does not constitute waste is conclusive of the fact that the use of sweet gas in the manufacture of carbon black likewise does not constitute waste, particularly so when each is found in, and each is capable of being produced from, a common reservoir. It, therefore, occurs to us that the fact basis for the declaration in one instance is binding upon the Legislature in the other; and that it is patent that the Legislature was palpably wrong in so distinguishing between and classifying sweet and sour gas, and that the act upon its face shows that such distinction and classification is purely arbitrary and there could be no fact justification therefor.

But, assuming that we are under the burden to show that there was no fact justification for the legislative fiat in declaring that the use of sweet gas for the manufacture of carbon black constitutes waste, we say that we have met and completely discharged that burden by the overwhelming competent testimony in the record.

The only finding of fact as contained in the court's Findings of Fact and Conclusions of Law, which could be taken as a basis for the court's conclusion to the effect

that the use of sweet gas in the manufacture of carbon black constitutes waste, and, therefore, the challenged provisions of the act prohibiting the use of sweet gas in the manufacture of carbon black bear a reasonable relation to the prevention of waste and the conservation of the natural resources of Texas, is the court's findings contained in Paragraphs 11 and 12 of its Findings of Fact and Conclusions of Law (R. 103-104), which we quote as follows:

> "11. With the exception of General Atlas Carbon Company, the carbon black plants in the Panhandle field use a manufacturing process known as the channel process, which was first introduced in 1892. In the manufacture of carbon black by the channel process heat is necessary and required and gas is burned, and in so doing no remainder thereof being saved for any other use. In this process natural gas is partly burned in an insufficient supply of air and a smoking and sooty flame results. This flame strikes an iron channel on which most of the carbon black deposits. The carbon black is scraped off this channel and drops into a screw conveyer. This process is the same process as was fully described in the case of Walls v. Midland Carbon Company, 254 U. S. 300. Either sweet or sour gas may be used in the production of carbon black and in such manufacturing process the gas is entirely used and there is no residue that can be devoted to any other useful purpose.
>
> "12. The carbon black industry has been nomadic, journeying from field to field in quest of a cheap and plentiful supply of gas. It has existed in the United States for over sixty years, moving generally westward, first in Pennsylvania, then in West Virginia, then in Louisiana, then Kentucky and latterly coming into Texas, Oklahoma, Utah, Montana, and Wyoming. As the various states tightened their

regulations by statutes and orders the industry moved on until now it is largely centered in the Panhandle field. At this time approximately 80 per cent of all the carbon black manufactured in the United States is manufactured in the Panhandle field. Since the invention of the channel process in 1892 very few improvements have been made in the method of manufacturing carbon black. Probably as much as 30 pounds of carbon can be recovered from one thousand cubic feet of gas by other processes than the channel process. The product so obtained is coarser in texture, is not commonly known as carbon black, and is not available for many of the uses to which the product of the channel process, known as carbon black, may be put. The restriction upon the use of gas which may be consumed in the manufacture of carbon black may cause advancements in the industry which will recover a greater yield of carbon black than is obtained by the channel process, but up to the present time there is no indication that any methods have been commercially developed other than the channel process."

In the above findings of fact the court arrived at an erroneous conclusion when it said "probably as much as thirty pounds of carbon can be recovered from one thousand cubic feet of gas by other processes than the channel process". There are no facts in the record that will warrant or sustain any such character of finding. It is undoubtedly this false assumption of fact that led the court to the erroneous conclusion that the use of sweet gas for the manufacture of carbon black constitutes waste, upon the theory that, theoretically, one thousand cubic feet of natural gas contains approximately thirty pounds of total or element carbon, whereas, only approximately one and one-half pounds of carbon

black can be recovered from such quantity of gas, and therefore the amount of recovery is disproportionate to the amount of gas utilized. This, of course, is not true for the reason that element carbon and the product carbon black are not one and the same but are entirely different products, as we will presently show from the undisputed evidence in the record.

Appellant, upon the trial of this cause, produced the following carbon black experts, gas experts and chemical engineers, who testified on the question of whether or not there is physical waste of gas in the manufacture of carbon black:

Howard Price, a graduate mechanical engineer, who has practiced his profession for 24 years, and for the last 15 years has been the general manager of the carbon black manufacturing plants of the J. M. Huber Corporation, who owns and operates carbon black manufacturing plants in Louisiana, Texas, and Wyoming;

H. H. Reardon, who has been in the employ of the Columbian Carbon Company and its predecessors for 20 years, and for the last 10 years has held the position of general manager of the carbon black manufacturing plants of the Columbian Carbon Company;

J. H. Mann, the president of Better Blacks, Inc., which company owns and operates a carbon black plant in Gray County, Texas, and who, for the past 30 years has been actually engaged in the construction and operation of carbon black plants in the states of Pennsylvania, West Virginia, Louisiana, and Texas; for a number of years

he was manager of the Imperial Oil & Gas Company's carbon black plants at Monroe, Louisiana, and he constructed and operated the carbon black plants of the International Gas Products Company of Monroe, Louisiana;

Clark C. Boardman of Monroe, Louisiana, a graduate mechanical engineer who, since 1923 has been engaged in the operation of plants for the production of gas carbon by the thermal decomposition process;

Herbert Dickard of Monroe, Louisiana, who, for the past 15 years has been actively engaged in the business of mechanical engineer, specializing in hydro carbons and in the production, transmission and utilization of natural gas;

W. A. Knapp of Monroe, Louisiana, who, for the past number of years has been actively engaged in the manufacture of carbon black in the Monroe field of Louisiana;

E. B. Reinbold, a graduate chemical engineer, who for the past 5 years has been the chief chemist of J. M. Huber Corporation, having charge of the chemical laboratories of such company;

S. O. Reeder, who for the past 21 years has been superintendent of carbon black manufacturing plants and who is the present superintendent, having actual charge and control of the operations of Combined Carbon Company.

From these witnesses, there has been conclusively established the following facts:

(1) That the carbon black industry is a useful and legitimate industry and that the product carbon black

is not only a useful commodity, but one which is necessarily and absolutely required for the public welfare, and that perhaps there is no product today that has such a wide range of utility as the product carbon black. That its principal uses are for the manufacture of printers' ink, automobile tires and other rubber products, paints, varnishes, lacquers, stove polish, shoe polish, carbon paper, typewriter ribbons, black and gray paper, bookbinders' board, crayons, golf balls, tarpaulins, insulating materials, phonograph records, cement, tile and artificial stone. (R. 168.)

(2) That carbon black can only be manufactured from natural gas. That it is an indispensable ingredient in the manufacture of ink adapted to the requirements of the modern rapid printing press, employed by the large daily newspapers, which are capable of printing 200,000 pages per hour, and which requires an ink of great covering power and which will flow freely, and make an instantaneous jet black impression; that one pound of carbon black, mixed with eight pounds of oil, will produce enough ink to print 20,000 pages of average newspaper size; that carbon black is likewise an indispensable ingredient in the manufacture of automobile tires; that it has wholly supplanted zinc oxide in such manufacture and that the automobile tire in which carbon black is used will wear from three to four times as long as the automobile tire in which zinc oxide is used; that, considering the number of automobile tires sold per year in the United States and the added mileage that carbon black gives to such tires, the use of carbon black in auto-

mobile tires alone saves the American public more than two billions of dollars per year. There is no ingredient that can take the place of carbon black in the manufacture of automobile tires. That approximately 90 per cent of the total production of carbon black is utilized in the manufacture of printers' ink and automobile tires. (R. 169-170, 187, 190-192, 195.)

(3) That the channel process which is practically universally used in the present day manufacture of carbon black—which is the type of process employed by Combined Carbon Company with whom appellant is under contract—is the most up-to-date and efficient process or method known to the industry for recovering the greatest amount of carbon black from the least amount of gas, and that through such process practically all of the carbon black contained in the gas utilized is actually recovered. That the average recovery of carbon black from one thousand cubic feet of gas, through the channel process, is one and one-half pounds, which is practically all of the carbon black that is contained in such quantity of gas. (R. 173, 188, 192, 197.)

(4) That in such manufacture there is absolutely no physical waste of gas or of the B.T.U. or heat units contained therein, and particularly is this true with reference to the plant of Combined Carbon Company. The gas is first passed through the absorbers of the appellant's gasoline plant where the gasoline content in the gas is recovered, and from there is transported through a steel pipe line to the plant of Combined Carbon Company, and the pressure at which the gas enters the Combined Carbon

Company plant is controlled by regulators and kept at the lowest possible point in order to promote economy, and the air supply is carefully regulated and the gas is fully utilized. That, in the manufacture of carbon black, heat is necessary and required to break down the gas in its component parts and separate the carbon black from the other chemical constituents of such gas; that all of the heat units contained in the gas are used for this purpose and there is no waste or loss of the heat units contained in such gas. That natural gas not only contains the raw material from which carbon black is manufactured, but likewise contains B.T.U. or heat units which are required to be actually utilized and applied in order to manufacture such carbon black. (R. 203-205, 170-171, 173-174, 188, 201-202.)

(5) That although, theoretically, one thousand cubic feet of natural gas at atmospheric pressure and 32 degrees Fahrenheit contains approximately 30 pounds of total carbon, this does not mean that it contains that amount of carbon black; that the total or element carbon contained in natural gas, and the pigment called carbon black, are vastly different products. If it were possible to extract the total element carbon contained in gas such product would not be carbon black and would have no commercial value whatever. The element carbon is a veritable Proteus, occurring in such diverse forms as the diamond, coal, asphalt, graphite, charcoal, pitch, oil, gas, and even exhaled air. In natural gas it is combined with hydrogen to form methane, and in the manufacture of carbon black it is not the problem to obtain a maximum

yield of element carbon, but the objective is to obtain a particular colloidal pigment composed of particles so fine as to be beyond the resolving power of the highest powered microscope, and possessing definite and unique qualities actually required in the manufacture of inks, paints and rubber compounds. (R. 189, 193-194, 197-198, 200-201.)

On this point we desire to quote briefly the testimony from a few of the carbon black experts who testified upon the trial of this case:

H. H. Reardon, general superintendent for Columbian Carbon Company, testified as follows:

> "Theoretically, under atmospheric pressure and 32 degrees Fahrenheit, one thousand cubic feet of gas should contain approximately thirty pounds of total carbon, but practically, this thirty pounds of total carbon will only produce about one and one-half pounds of carbon black. If it were possible to extract all of the element carbon from natural gas such product extracted would not be carbon black and it woud have no commercial value or utility whatever. Thus, it is obviously erroneous to say that, because a thousand feet of natural gas theoretically contains thirty pounds of total carbon and the recovery of carbon black from a thousand feet of gas is only one and one-half pounds, therefore the manufacture of carbon black is only five per cent efficient. To talk in such abstract terms is to consider the element carbon and the pigment called carbon black as one and the same product. They are vastly different and of course cannot be compared in any sense as to quality, utility or commercial value. The product carbon black is as different from the element carbon as high grade steel is from the ore from which it is manufactured. * * *" (R. 189.)

E. B. Reinbold, chief chemist for J. M. Huber Corporation, testified as follows:

"The average natural gas is mainly methane, which, at atmospheric pressure and 32 degrees Fahrenheit, theoretically contains approximately thirty pounds of carbon per thousand cubic feet, which carbon, under a certain degree of heat application, will produce an average maximum of approximately one and one-half pounds of carbon black. It is entirely erroneous for one to say that because a thousand cubic feet of gas at the heat and pressure above mentioned theoretically contains approximately thirty pounds of carbon, that the carbon black manufacturing industry is inefficient when the average recovery of carbon black is approximately one and one-half pounds per thousand cubic feet. The total element carbon contained in gas, and the pigment called carbon black, are two entirely different and separate products. If it were possible to extract the total element carbon contained in gas, such product would not be carbon black and would have no commercial value whatever. The element carbon is a veritable Proteus, occurring in such diverse forms as the diamond, coal, asphalt, graphite, charcoal, pitch, oil, gas, and even exhaled air. In natural gas, it is combined with hydrogen to form methane, and in the manufacture of carbon black it is not the problem to obtain a maximum yield of element carbon, but the objective is to obtain a particular colloidal pigment composed of particles so fine as to be beyond the resolving power of the highest powered microscope and possessing definite and unique qualities absolutely required in the manufacture of inks, paints and rubber compounds. Practically all carbon black today is manufactured according to specifications and requirements of the users of such product, and the industry knows of no more efficient method than the channel process to obtain the maximum amount of carbon black from

the least amount of gas to meet the specifications and requirements of the users of such product. * * *" (R. 193-194.)

Clark C. Boardman, mechanical engineer, testified as follows:

"The big majority of carbon black today is manufactured by what is termed the channel process. This process or type of plant is used almost exclusively in the Panhandle gas field of Texas. It is the most efficient process known to the carbon black industry for recovering the greatest amount of that character of carbon black from the least amount of natural gas that will meet the specifications and requirements of the tire and rubber manufacturers and ink manufacturers, who afford more than 90 per cent of the total market of all carbon black manufactured today. The average yield of carbon black from a thousand cubic feet of natural gas, where the channel process is used, is from one and one-half to two pounds. The average natural gas is mainly methane, which at atmospheric pressure and 32 degrees Fahrenheit, theoretically contains approximately thirty pounds of carbon per thousand cubic feet, but this does not mean that one thousand cubic feet of gas at such pressure and heat contains or would yield thirty pounds of carbon black. In the first place, there is a wide distinction between the element carbon and the pigment called carbon black. A thousand cubic feet of gas contains approximately thirty pounds of the element carbon, but not of the pigment called carbon black. In the manufacture of carbon black it is not the problem to obtain a maximum yield of carbon, or even of black carbon. If this were all that were sought to be accomplished, it could be more easily and economically done by powdering coal, coke, charcoal, or graphite, but in the manufacture of carbon black from natural gas, the real and true objective is to obtain a particular colloidal pig-

ment composed of particles so fine as to be beyond the resolving power of the highest powered microscope and possessing certain definite and unique qualities when employed in inks, paints and rubber compounds.

"Therefore, from what I have said above, it is entirely erroneous for one to say that because one thousand cubic feet of natural gas at the pressure and heat conditions above mentioned, theoretically contains approximately thirty pounds of carbon, that the carbon black manufacturing industry is inefficient when the recovery of the product or pigment called carbon black is from one and one-half to two pounds per thousand cubic feet. That, in truth and in fact, all of the carbon black that is contained in natural gas, which will meet the specifications and requirements of users of such carbon black, is obtained from such gas through the channel process. At least, no one thus far has discovered a means of materially increasing the yield of carbon black without losing some of the qualities peculiar to carbon black alone, and to which it owes a large part of its universal utility. * * *" (R. 200-201.)

Herbert Dickard, mechanical engineer, testified as follows:

"In natural gas, where the carbon content is approximately thirty pounds per thousand cubic feet, the recovery of carbon black is from one and one-half pounds to two pounds per thousand cubic feet. To the average person who does not have knowledge of the innumerable physical forms of carbon and heat reactions, this would appear, offhand, to be a low recovery, but actually, it is a very high and efficient recovery. Because one thousand feet of gas may contain, theoretically, thirty pounds of total carbon does not mean at all that it contains thirty pounds of carbon black. The total element carbon

contained in gas, and the pigment or product called carbon black, are entirely two different and separate products. The pigment called carbon black can only be obtained from the element carbon, or the total hydro carbons contained in natural gas, by the application of heat, in order to break down and separate the pigment called carbon black from the hydro carbons contained in the gas. If it were possible to extract the total volume of carbon contained in gas, such product would not be carbon black and would have no commercial value whatever. As a matter of fact, the present channel process universally used in the manufacture of carbon black recovers all of the pigment or product known as carbon black contained in gas that will meet the specifications and requirements that the users and consumers of such product demand. At least, the best engineering brains for the past quarter of a century have not been able to devise any process to materially increase the yield of carbon black over the channel process. It is true that experiments have been made with other processes, and there will be found a few small plants using other processes instead of the channel process, in some of which the recovery of carbon from the gas will range from eight to twelve pounds, but the product manufactured is not carbon black, and it cannot be used in commodities in which carbon black is used as an ingredient, and particularly cannot be used in the manufacture of the automobile tire and printers' ink, and the market for such character of carbon is very limited. The production from this type of process is comparatively small and cannot be classed as a part of the carbon black industry. * * *"
(R. 197-198.)

(6) That there is actually no waste of carbon black during its manufacture. That an actual chemical analysis of the fumes contained in the top of the burner houses and vapors and smoke going into the air shows that only

an infinitesimal amount of carbon black from one thousand cubic feet of gas consumed actually goes into the air with the vapors and burned gases. That this small quantity of carbon black cannot be economically recovered, and if it could be recovered, regardless of the cost, it would be worthless for the reason that the particles thereof contain volatile matter which renders the same unfit for use in the products in which carbon black is a necessary ingredient, and further, that the chemical analysis of the fumes contained in the burner houses shows that there is practically complete combustion of the gas when used in the manufacture of carbon black. (R. 194, 202.)

The only witness produced by the state in this case, who attempted to give any testimony to the effect that the manufacture of carbon black from natural gas constituted waste, was F. V. L. Patten, a chemical engineer, who graduated from the University of Texas in June, 1935, and since such time has been employed by the Railroad Commission of Texas. His testimony was to the effect that the channel process was only four and one-half per cent efficient for the reason that there was only recovered on an average of one and one-half pounds of carbon black from a thousand cubic feet of gas, when such amount of gas contained from thirty to thirty-five pounds of total carbon. He attempted to make no distinction between the use of sweet or sour gas in this so-called efficiency, and if Mr. Patten is correct in the conclusions that he reached, then the Legislature was wrong in declaring that the manufacture of carbon black from sour

gas did not constitute waste. Mr. Patten further testified that there were several other processes known where a larger yield or recovery could be obtained than through the channel process. One, a thermatomic process, which he said was actually being employed in the manufacture of carbon black, yielded a recovery of approximately nine pounds per thousand cubic feet. Another was a process known as an electric discharge process, but when Mr. Patten was called to the stand for cross examination concerning the matters to which he had testified in his affidavit, he quickly demonstrated that he knew nothing of the subject concerning which he attempted to testify. He admitted that there was a distinction between element carbon and the pigment called carbon black. He admitted that he had never made a chemical analysis of the carbon black produced from a channel plant and had never made a chemical analysis of the carbon produced from a thermatomic plant, which he stated was operating near Monroe, Louisiana; that he had never seen the thermatomic process in operation, did not know the degree of heat employed in the furnace during such process, before the gas was introduced into such furnace, did not know the uses of the carbon produced by the thermatomic process, and admitted that all he knew about the subject concerning the channel process, as well as the other processes referred to in his affidavit, was what he had read. He attempted to explain what he meant by the electrical discharge process, but we submit that his attempted explanation shed no light upon the nature of this fantastic theory but left the matter shrouded in deeper gloom. So apparently ridiculous was

his testimony on the subject of carbon black manufacture and whether or not the same constituted physical waste, that we are willing to pass his testimony with the comment that it amounted to absolutely nothing, and the facts produced by appellant's witnesses, on this question as to whether or not the manufacture of carbon black constitutes waste, if indeed that be a question at all, stand in this record as absolutely unchallenged. (R. 317-320.)

Not only is there no physical waste of gas in the manufacture of carbon black, but likewise there is no economic waste, if economic waste can be considered. The evidence shows that the present market price of carbon black at the plants of the manufacturers in the Panhandle field is 4 cents a pound; that the present market price for natural gasoline in the Panhandle field is 3 cents per gallon; that the average carbon black recovery from a thousand cubic feet of natural gas is one and one-half pounds, and of natural gasoline one-half gallon. Computed on this basis, the value of one thousand cubic feet of gas utilized for the manufacture of natural gasoline and carbon black is 7½ cents. This is greatly in excess of the value of gas procured in the Panhandle field and utilized in such field for industrial and fuel purposes; that gas in the Panhandle field is produced and sold for these purposes at from 1 to 5 cents per thousand cubic feet, and that the average price of such gas would not exceed 3 cents per thousand cubic feet. (R. 360-361.)

It cannot be contended that the manufacture of carbon black from natural gas is a wasteful utilization of gas

on the ground that the heat units contained in such gas are lost and destroyed, for the reason that the undisputed testimony in the record, as we have pointed out above and as the court correctly finds in its findings, shows that in the manufacture of carbon black heat is required for the purpose of breaking down the chemical constituents of gas and separating the carbon black from the other elements contained therein, and all of the heat units in the gas are actually utilized and applied for such purpose.

In the face of the testimony above pointed out, and the following facts in substance as found by the court in its findings of fact: that the Panhandle field is underlaid by a single or common reservoir which produces both sweet and sour gas; that such gas migrates from one portion of the field to another, depending upon the pressure conditions prevailing; that there is a lower pressure condition obtaining in the sour area than in the sweet area; that the sour gas demand for carbon black manufacture is practically equal in volume to the sweet gas demand for light and fuel purposes (R. 101); that there is no basic difference between sweet and sour gas contained in the Panhandle reservoir as to their B. T. U. content or carbon black productivity, when considered in the light of the provisions of the statute under attack which authorizes withdrawals of gas from a common reservoir to the extent of the respective requirements of the users of gas for light and fuel and the users for carbon black requirements, how can it be said that the provisions of said statute complained of bear a reasonable relation to the

prevention of waste and the conservation of the natural resources of Texas?

We desire to point out that nowhere did the District Court, in its findings of fact, find that appellant in its operations was causing any physical waste of gas directly or indirectly, other than that the use of sweet gas in the manufacture of carbon black, in itself, constitutes waste. The evidence in the record is uncontroverted to the effect that there is no physical waste of gas which is being processed in the plant of appellant at Sanford, Texas, for the extraction of the gasoline content therefrom and the delivery of the residue thereof to the Combined Carbon Company for the manufacture of carbon black; that the plant of appellant has been constructed with the most modern machinery known to the gasoline industry and that the latest, most modern approved methods are employed in such extraction process in said plant and that the plant of Combined Carbon Company has been constructed with the most up-to-date and modern machinery for the manufacture of carbon black and that the latest approved methods and processes for such manufacture are employed by the Combined Carbon Company; that there is no physical waste of gas in such operation from the time that the same is produced at the well to the time that the residue is consumed in the manufacture of carbon black. That the wells to which the appellant's plant is connected are capped to prevent the escape of gas into the air; that such gas is transported through pipe lines from the well openings to appellant's plant and there it is run

through absorbers and the gasoline content extracted, and from there it goes into the residue pipe line and is transported to the plant of Combined Carbon Company. (R. 130-131, 203-205.)

Need we dwell further concerning the facts in evidence on this point? Does not the overwhelming preponderance of the evidence absolutely show that there is no physical waste in the use of sweet gas for the manufacture of carbon black? Has not appellant discharged the burden of proof and does not such evidence overcome the presumption in favor of the legislative fiat?

In *Liggett Co. v. Baldridge*, 278 U. S. 104, 73 L. Ed. 204, this Court, although the members of the three-judge court had held a reasonable relationship existed between the evil and the remedy sought to be applied, struck down a statute of Pennsylvania requiring that drug stores be owned only by a licensed pharmacist, and, in the case of corporations or partnerships, that all partners or members be licensed pharmacists. It was held that the act had no real and substantial relation to the promotion of the public health, and was a clear and arbitrary invasion of appellant's property rights, in that:

> "A State cannot, under the guise of protecting the public, arbitrarily interfere with private business or prohibit lawful occupations or impose unreasonable and unnecessary restrictions upon them."

In *Seattle Trust Co. v. Roberage*, 278 U. S. 121, 49 Sup. Ct. 50, 70 L. Ed. 210, this Court said:

> "Legislatures may not, under the guise of the police power, impose restrictions that are unneces-

sary and unreasonable upon the use of private property or the pursuit of useful activities."

In *Bartels v. Iowa*, 262 U. S. 412, 43 Sup. Ct. 628, 67 L. Ed. 1047, this Court said:

> "A statute may not stand if, 'considering the end in view, the statute passes the bounds of reason and assumes the character of a merely arbitrary fiat'."

Again, this Court, in *Treigle v. Acme Homestead Association*, 80 L. Ed. 391, decided February 3, 1936, held:

> "Police power must be exercised for an end which is in fact public, and the means adopted must be reasonably adapted to the accomplishment of that end and must not be arbitrary or oppressive."

In *Gulf C. S. F. R. Co. v. Ellis*, 165 U. S. 150, this Court said:

> "But it is said that it is not within the scope of the Fourteenth Amendment to withhold from states the power of classification, and that if the law deals alike with all of a certain class it is not obnoxious to the charge of a denial of equal protection. While, as a general proposition, this is undeniably true, * * * yet it is equally true that such classification cannot be made arbitrarily. * * * That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and never can be made arbitrarily and without any such basis."

The District Court, on the hearing of the application for interlocutory injunction in this case, laid down the correct rule applicable to the power of the Legislature of

Texas to regulate the production and use of its natural resources, when it said:

> "The right of the Legislature to regulate these various matters connected with the production of oil and gas, insofar as Texas is concerned, has always been hinged on the doctrine of conservation of natural resources and the prevention of waste. Amazon Petroleum Corp. v. R. R. Com., 5th Fed. (Supp.) 633; McMillan v. R. R. Com., 51 Fed. (2) 400; F. C. Henderson, Inc. v. R. R. Com., 56 Fed. (2) 218; Danciger Oil & Ref. Co. v. R. R. Com., 49 S. W. (2) 837, 842; 56 S. W. (2) 1075 (C. C. A.); Peoples Petro. Producers Co. v. Sterling, 60 Fed. (2) 1041; Peoples Petro. Producers Co. v. Smith, 1 Fed. (Supp.) 361; Canadian River Gas Co. v. Terrell, 4 Fed. (Supp.) 222. If the regulation has no reasonable relationship to these matters, then it constitutes an unreasonable interference with the rights of private property." (R. 80.)

3. THE COMPLAINED OF PROVISIONS OF SAID STATUTE, AS APPLIED TO APPELLANT AND ITS PROPERTIES, ARE CONFISCATORY.

The enforcement of the provisions of said statute complained of, and the orders of the Railroad Commission promulgated thereunder, against appellant and its properties, will not only deny to appellant the right to reasonably use its said property for lawful purposes without physical waste thereof, but will absolutely destroy such property, in that such act and order dedicate the same to a use for which there is no outlet or market afforded to appellant and thus the same amounts to the taking of appellant's property without due process, in violation of the Fourteenth Amendment to the Constitution of the United States.

The District Court found as a fact the following:

"The complainant, The Henderson Company, produces both from wells located on properties on which it owns gas and oil leases and purchases production from other producers in the field. There are 21 gas wells connected to its plant. Acting under authority of House Bill 266 the Railroad Commission has determined that 14 of the wells connected to the plant of The Henderson Company, complainant, are within the classification of sweet gas wells as defined in said act, leaving 7 wells which are classified as sour gas wells under the terms of the statute. There are no unconnected sour gas wells in the vicinity of The Henderson Company's gasoline plant to which it can connect and utilize the same for gasoline and carbon black manufacture; that the only available sour gas area in the Panhandle field is located miles distant from the plant of The Henderson Company and is an area undeveloped which would require an expenditure on behalf of The Henderson Company in excess of $300,000.00 to acquire and develop the same in laying pipe lines thereto for the purpose of transporting the same to complainant's plant to meet its carbon black requirements. There is no market available to complainant, The Henderson Company, for the gas being produced from the 14 wells connected with its plant and classified as sweet gas wells, for light and fuel purposes. That there is no immediately available market for sweet gas in the Panhandle field. That there is no market for sweet gas in the Panhandle field for other purposes provided in said act for which sweet gas may be used: (a) chemical manufacturing, (b) introduction of gas into the oil and gas bearing horizon in order to maintain or increase the ultimate recovery of gas from such horizon. That in the opinion of witnesses it is wholly economically impractical, if possible, to return the residue gas after the extraction of gasoline content therefrom back into the horizon from which it is produced.

"Under the provisions of House Bill 266 the complainant, The Henderson Company, can only supply the Combined Carbon Company with the production from such seven wells after the extraction of the gasoline content from such gas in the gasoline plant of The Henderson Company, and the use of the gas from the 14 wells which have been classified as sweet gas wells for the manufacture of carbon black is prohibited to it by the provisions of House Bill 266. Under House Bill 266 such 7 wells, which have been classified as sour gas wells, cannot be produced in excess of 25 per cent of their potentials. When produced at 25 per cent of their potentials the production from such wells is insufficient to supply the requirements of the complainant, The Henderson Company. Under its contract with Combined Carbon Company, a portion of production from the 14 wells connected to such plant, which have been classified as sweet gas wells, may be used to meet the fuel demands of such plant, which are approximately eight million cubic feet per day. The contract of complainant, The Henderson Company, with the Combined Carbon Company, provides that the complainant will sell to Combined Carbon Company all of the stripped or residue gas now being produced or which may hereafter be produced at its gasoline plant as the Combined Carbon Company may be able to make use of or dispose of by sale to other parties for such period of time as the complainant, The Henderson Company, shall use and produce such gas at its said plant or extension or any addition thereto. The contracts for the purchase of gas by the complainant, The Henderson Company, by their terms and provisions, apply to gas which may be lawfully used for the single and utimate purpose of natural gasoline extraction." (R. 106-108.)

As found by the court, and the evidence sustaining such findings is undisputed, the appellant is under con-

tract with Combined Carbon Company to deliver to Combined Carbon Company from its plant sufficient residue gas for the requirements of Combined Carbon Company; that the present requirements of such company are approximately 30,000,000 cubic feet of gas per day. (R. 205.) That the remaining seven wells classified by the Railroad Commission as sour gas wells, connected with appellant's plant and from which only it is authorized by said act to receive gas for processing in its gasoline plant and delivering the residue to Combined Carbon Company, even though producing at 25 per cent of their open flow capacity,[1] will not produce sufficient gas to meet the requirements of Combined Carbon Company. That there are no other sour gas wells in the vicinity of appellant's plant without connection and to which appellant can connect for the purpose of obtaining sufficient gas to meet the requirements of Combined Carbon Company. As a result of this condition, the Combined Carbon Company is threatening to cancel its contract with appellant, (R. 130), leaving appellant without any residue connection at all, in which event appellant could not process any gas, even from any of its remaining sour gas wells. In addition to these facts, the gas contracts which appellant owns and holds upon the fourteen wells, so classified by the Commission as sweet gas wells, are valuable property rights. Under the terms of such contracts they endure so long as gas is capable of being produced upon the land covered by the leases which are the subject of such contracts. (R. 220). In addition, appellant is the owner of certain of the wells so classified

[1]Section 15.

as sweet, and the leases upon which the same are located, in its own right. (R. 126.) The District Court found that there is no market afforded appellant for the gas capable of being produced from said fourteen wells, so classified as sweet gas wells, for light and fuel purposes, and neither is there any market for any of the other uses for which sweet gas is authorized to be used under the provisions of said statute. (R. 107, 131-132, 142-143, 153-154, 159-161, 209-210.)

The evidence is uncontroverted to the effect that the only outlet or market for gas in the Panhandle field is for two purposes, to-wit: For light and fuel and for carbon black manufacture; that the market for light and fuel purposes is absolutely dominated and controlled by certain large pipe line companies, who have obtained their own markets, acquired their own gas reserves, constructed their own pipe lines and transportation facilities, have drilled their own wells and are producing from their own properties gas for their own market requirements; that they have never offered, in the past, and do not now offer, any market to those owners of sweet gas who have heretofore been, and are now, without markets for light and fuel purposes. They have never offered, in the past, and do not now offer, any market to the owners of gas containing any degree of hydrogen sulphide, for two reasons: first, they have had, in the past, and have now, sufficient gas of their own for their own market requirements; and second, because such gas contains hydrogen sulphide. For these two reasons appellant has never been offered in the past any market for its

gas, either at the mouth of the wells owned by appellant, or for the residue gas at the plant of appellant, and because of the enormous reserves of the pipe line companies, which constitute approximately 75 per cent of the sweet gas area of said field, appellant is afforded no hope of being able to dispose of its gas in the future for light and fuel purposes. (R. 131, 133-134, 142.)

In this connection, the Court will take judicial knowledge of the fact that upon three different occasions in the past, as shown in the record in Cause No. 89, Thompson et al v. Consolidated Gas Utilities Corporation, pending in this Court, certain of the pipe line companies, above referred to, through suit, have stricken down certain acts of the Legislature of Texas and orders of the Railroad Commission, having for their purpose the compelling of the pipe line companies to offer a market and outlet to the other producers of gas in the Panhandle field. The Court will further take judicial knowledge of the fact that two of such pipe line companies have instituted suit, which suits are now pending before this Court, having for their purpose the striking down of the proration provisions of said act involved in this cause, which provisions have for their purpose the compelling of the pipe line companies to offer a market to others producing sweet gas in the Panhandle field. We merely refer to this as additional evidence to show that the pipe line companies, operating in the Panhandle field, have not in the past, and do not intend in the future, to offer a market or outlet to other producers in such field for light and fuel purposes, yet they dominate and con-

trol the entire light and fuel market from such field. Appellant has no complaint against the attitude of the pipe line companies in this respect, but is here contending purely for the same privilege as is enjoyed by them, which is the right to utilize its property for useful purposes, without waste.

As heretofore pointed out, the evidence conclusively shows, and the District Court so found, that the other purposes for which sweet gas is authorized to be used, by the act, are either impossible or impractical of performance or frivolous, to the extent that there is not now and could never be, any appreciable market or outlet afforded the owners of sweet gas in said field for such purposes with the result that said act purports to dedicate, confine and restrict the use of sweet gas, as the same is defined in said act, for the sole purpose of light and fuel. Said act nowhere requires that those controlling the light and fuel market take proportionately or ratably gas from appellant's properties, so classified by said act and order as sweet gas, to the extent of their light and fuel market, or any amount of gas whatever, and the appellant, therefore, has been restricted by said act and order in the use of its property to the extent that it is absolutely denied any use for its said property, and this, regardless of the fact that appellant in its operations is causing no actual physical waste of its gas.

Therefore, the necessary effect of the complained of provisions of said statute, if enforced against appellant and its properties, is to appropriate, without compensation or appellant's consent, appellant's gas, so classified

by the Commission as sweet, to the pipe line companies who own and control the only outlet and market for the uses for which the statute authorizes sweet gas to be utilized, to-wit: Light and fuel, and to the owners of adjoining and adjacent sour gas wells, to which appellant's gas will be drained and drawn and there produced and utilized for the identical purpose that appellant, by such statute, is denied the right to use its gas. This is the actual effect of the provisions of said act and order, if the same be enforced against appellant and its said properties, irrespective of the declaration of purposes contained in said act, and it is the effect of the act, not the declared purpose, that the courts will look to when its validity has been attacked. *Henderson v. Wickham*, 92 U. S. 259, 23 L. Ed. 543.

The right to use and the right to sell one's property are essential elements of ownership, without which there is no complete ownership of property. *Forster v. Scott*, 18 L. R. A. 543, 546. *Lockner v. New York*, 198 U. S. 45, 49 L. Ed. 937. And, taking a part is as much forbidden by the Constitution as taking the whole. The difference is only one of degree. *Eaton v. Ry. Co.* (N. H.) 12 Amer. Rep. 147. So too, the deprivation of the right to use one's property or the imposition of restrictions rendering such use impossible, is the taking of property in as real a sense as if the same were physically appropriated. *Dobbins v. Los Angeles*, supra. *Pompelly v. Green Bay, etc.*, 13 Wall. 166, 20 L. Ed. 557.

But here, not only will appellant be denied, under the enforcement of the provisions of said act complained of,

the right to use its gas, but the evidence is convincing that appellant's gas will be drained and drawn to adjoining leases and there actually appropriated by others.

This taking of appellant's property violates the due process clause of the Fourteenth Amendment. The due process provisions of the Texas Constitution is even more stringent than that of the due process clause of the Fourteenth Amendment. Article 1, Section 17 of the Constitution of Texas is as follows:

> "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by consent of such person; and when taken, except for the use of the state, such compensation shall be first made or secured by a deposit of money."

The Supreme Court of Texas, in considering this constitutional provision, laid down a stringent requirement that the use be a public and not a private one. In *Borden v. Tres Palacios Rice Co.*, 98 Tex. 494, 86 S. W. 11, the Court said:

> "Property is taken for public use, as intended by the Constitution, only when there results to the public some definite right or use in the business or undertaking to which the property is devoted, and we further agree that this public right or use should result from the law itself and not be dependent entirely upon the will of the donee of the power. * * * We are not inclined to use that liberal definition of the phrase 'public use' adopted by some authorities which make it mean no more than the public welfare or good, and under which rule any kind of extensive business which promotes the prosperity and comfort of the country might be aided by the power of eminent domain."

The taking of property from appellant as evidenced by the record here does not meet the test of a public use provided in the Borden case.

This Court, in *Cotting v. Goddard*, 183 U. S. 78, on page 86, quoting from Reagan v. Farmers Loan & Trust Co., said:

> "The equal protection of the laws which, by the 14th Amendment, no state can deny to the individual, forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guaranties, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property legally acquired and legally held."

In *Pennsylvania Coal Co. v. Mahon*, 260 U. S. 393, the Court held invalid, as applied to the defendant, the Kohler Act, which prohibited, under named conditions, the mining of anthracite coal within city limits in such way as to cause the subsidence of any dwelling or other structure used as a human habitation, or any factory, store, or other industrial or mercantile establishment in which human labor is employed. Mr. Justice Holmes, in discussing Pennsylvania Coal Co. v. Mahon, supra, said:

> "As applied to this case the statute is admitted to destroy previously existing rights of property and

contract. The question is whether the police power can be stretched so far." * * *

"The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. It may be doubted how far exceptional cases, like the blowing up of a house to stop a conflagration, go—and if they go beyond the general rule, whether they do not stand as much upon tradition as upon principle. Bowditch v. Boston, 101 U. S. 16. In General it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders. Spade v. Lynn & Boston R. R. Co., 172 Mass. 488, 489; 43 L. R. A. 832. We are in danger of forgetting that a strong public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. * * *"

4. THE COMPLAINED OF PROVISIONS OF SAID STATUTE AS APPLIED TO APPELLANT AND ITS PROPERTIES ARE DISCRIMINATORY.

(a) Between appellant and other producers similarly situated.

Again, we call the Court's attention to these basic and established facts in the record, heretofore pointed out:

That the Panhandle gas field is underlaid by a common reservoir productive of sweet and sour gas contained in the same formation and between the sweet and sour gas areas there is no structural barrier; that the gas in such reservoir migrates from the higher to the lower pressure area and that withdrawal of gas from either the sweet or the sour area will necessarily affect the rock pressure and ultimate recovery from the other portions of said reservoir; that owing to a greater with-

drawal in the past of gas from the sour area than from the sweet area, a lower pressure condition now exists in the sour gas area than in the sweet gas area. Consequently, there has been migration in the past and there is migration now of sweet gas from the higher pressure areas into the sour gas area of lower pressure. These facts are indelibly pictured by the testimony of the witness, C. Don Hughes, a geologist of unquestioned qualifications, who for years has made a study of the Panhandle oil and gas reservoir. Said witness testified as follows:

> "At the request of complainant, affiant has made a study of the history of production, the reserves, and the existing pressures as between wells located in what is commonly called the sour gas area in the West Panhandle field and the sweet gas area of such field. Originally, the pressure throughout both areas was uniform at about 430 pounds per square inch. Affiant states that the total area productive of free sour gas is 270,000 acres, containing originally a total volume of approximately 3,155,000,000,000 cubic feet. The area producing free sweet gas in the West Panhandle field is approximately 723,000 acres, with an original reserve of 12,345,000,000,000 cubic feet. Affiant's estimate of the total production of gas from wells located in the sour gas area to date is 2,285,000,000,000 cubic feet. A portion of this gas has been replenished by migration from the sweet gas area, and affiant estimates that there is now contained in the formations underlying the sour gas area approximately 2,297,000,000,000 cubic feet. These figures disclose that there has been a migration from the sweet gas area to the sour gas area of approximately 1,427,000,000,000 cubic feet of sweet gas.
>
> "According to the Railroad Commission's records of pressures taken by representatives of that body

during the months of June and July, 1935, the average rock pressure of the gas wells located in the sour gas area was 94 pounds per square inch lower than the average rock pressure of the sweet gas wells in the West Panhandle field.

"With this wide differential in pressure, there is a tremendous migration of gas from the sweet gas area to the sour gas area." * * * (R. 143-144).

The statute recognizes that so-called sweet and sour gas may be contained in one common pool or reservoir and affected by the same reservoir energy, but it does not provide for equal withdrawals from the respective sweet and sour areas for the purpose of maintaining a uniform rock pressure, but specifically authorizes the Commission to zone such sweet and sour gas areas[1] and particularly authorizes the withdrawals in such areas to be in proportion to their respective market demands[2]. The sour gas area comprises less than one-third of the entire reservoir (R. 99), while the market demand for carbon black manufacture practically equals the demand for light and fuel purposes. (R. 101.)

Said witness, Hughes, further testified:

"Since October 1, 1935, the sour gas wells have been permitted to produce approximately 25 per cent of their potentials. Under the order effective February 1, 1936, sour gas wells are limited to 15 per cent of their potentials. The orders affecting sweet gas wells in the West Panhandle field, including that effective February 1, 1936, have limited the production from sweet gas wells to approximately 7 per cent of their potentials. Taking the whole sweet gas rea, the allowable has been approximately 6 per cent of the potentials. Thus it appears that

[1]Section 19.

[2]Sections 12, 13, 19.

under the previous orders sour gas wells were permitted to produce at a rate, based on potentials, of approximately four times that of sweet gas wells, and under the present order they will be permitted to produce at more than twice the rate, based on potentials, of sweet gas wells. All these orders have manifestly increased the pressure differentials now existing, with a consequent increase in the migration of gas from the sweet gas area to the sour gas area. The inevitable result will be that enormous quantities of sweet gas will be drained from beneath the sweet gas area into the sour gas area and there produced from wells classified as sour gas wells. Under the statutory provisions permitting the use of sour gas only for the manufacture of carbon black, it will inevitably follow that much of the gas which could now be produced from wells classified as sweet gas wells will be produced from wells now classified as sour gas wells and will be subject to use for the manufacture of carbon black. The only difference in producing this gas from sour gas wells and thus using it, and in producing it from sweet gas wells and burning it to carbon black, is that under the operation of the statute this migrating gas will be produced by others than its present owners, while its present owners will be denied that use and will thus lose their gas to their neighbors across the sour gas line. This is not a theoretical loss, nor is it an inconsequential loss. It is clearly demonstrable from the physical facts, and will run into substantial values in a very short time.

"Even if every well classified as a sweet gas well were producing its allowable and delivering gas to the outlets for those uses allowed for sweet gas under the statute, the observations in the next preceding paragraph would apply. As a matter of fact, however, many of the wells classified as sweet gas wells have no present outlet for uses permitted under the statute, and these wells may be shut down for an indefinite time for lack of a market outlet

for permitted uses. These wells for the most part are located in close proximity to the sour gas line, and these wells would be subjected to special and immediate drainage as a result of producing the full permitted outlet for carbon black purposes to be produced from the wells now classified as sour gas wells. The sum total of the practical operation of this statute as applied to these sweet gas wells located for the most part to the south and west of the sour gas line will be that the owners of these wells will not be permitted to produce this gas and use it for carbon black, and for the time being will not have a market outlet for light and fuel uses, and they will contribute enormous quantities of gas from the leases on which their present wells are located to those who produce gas for the manufacture of carbon black, with no material difference from the standpoint of the State in that this gas now sweet will be produced as sour gas after being diffused with gas now sour.

"Applying the observations above made to the conditions prevailing in southwest Hutchinson County, where are located the plant of The Henderson Company and the wells connected thereto, affiant shows that there are 21 wells connected to this Henderson plant, all of which are marked by the letter 'H.' Seven of these wells are north and east of the sour gas line and fourteen of these wells are to the south and west thereof. Several of the fourteen wells now classified as sweet were formerly sour gas wells. Those most remotely situated with reference to the sour gas line have been produced only about one year. A large number of the wells located in the same area and classified as sour gas wells, are connected to other plants than the Henderson plant, and a result of producing all the sour gas wells in this area up to 15 per cent of their potentials will inevitably be that enormous quantities of gas will be drained from the fourteen wells connected to the Henderson plant, but not now being produced be-

> cause of their classification as sweet gas wells, to the wells in the same area classified as sour gas wells. * * *" (R. 145-147.)

The witness, J. B. Massa, gas engineer, who for a number of years was employed by the Railroad Commission of Texas as its gas engineer in charge of the Panhandle field, testified as follows:

> "That there are lower pressure areas in the sour gas district in the West Panhandle field than the pressure conditions obtaining in the Sanford area where the leases under contract with The Henderson Company are located. That if no gas be produced from the leases of The Henderson Company and production from adjoining or nearby leases continues, a lower pressure condition will obtain in the areas of production and the gas underneath the leases of The Henderson Company will, in time, be drained and drawn to the producing area. * * *" (R. 159.)

The provisions of the statute, classifying and distinguishing between sweet and sour gas and prohibiting the use of sweet gas in the manufacture of carbon black, purport to conserve all gas in Texas falling within the classification of the statute as sweet gas, for the purposes for which the statute authorizes such gas to be utilized. That the Legislature has the power, for the purpose of marshaling the natural resources of the state —when one resource is fitted for two uses and another resource for only one use—to classify these natural resources as to the use to be made of them, as was concluded by the District Court, (R. 110), is no answer to the attack made by appellant upon the complained of provisions of said statute in their application to appel-

lant and its properties. Assuming, for the sake of argument, that generally speaking, the Legislature has such power, and assuming that the legislative classification of and distinction between sweet and sour gas, when considering all of the gas fields in Texas as a whole, bear a reasonable relation to the purposes sought to be accomplished, that is, the conservation of the statutorily defined sweet gas for the purposes for which said statute authorizes the same to be used, yet when said statute is applied to the Panhandle field where appellant's properties are situated, the legislative classification and distinction between sweet and sour gas can have no relation to the assumed purposes sought to be accomplished by the statute. Applying such statute to the Panhandle gas field, appellant's sweet gas is purported to be dedicated to the uses for which sweet gas is authorized to be utilized by said statute. But, this is not the case. Under the evidence above pointed out, and which stands unchallenged in the record, there is no escape from the conclusion that, the appellant being denied any market or outlet for its gas, classified by the Legislature and the Commission as sweet gas, which fact was found by the District Court, such gas will be drained and drawn to the sour gas producing wells and there produced and used by the owners of such sour wells in the manufacture of carbon black. Thus, appellant will be denied the use of its gas in the manufacture of carbon black, whereas, others engaged in the same character of business as appellant will be permitted to take and appropriate appellant's gas and use it for the very purpose which the statute denies to appellant. This is the actual

and necessary effect of the application of said statute to the Panhandle gas reservoir and to appellant and its properties, and it is the effect, not the purposes, of the statute that the courts will look to when its validity has been attacked. Therefore, we say that the complained of provisions of said statute bear no reasonable relation to the object sought to be accomplished; that the same are purely arbitrary and, as applied to the Panhandle gas reservoir and appellant's properties, such provisions are discriminatory and are violative of the due process and equal protection of the law clauses of the Fourteenth Amendment to the Constitution of the United States and the Constitution of the State of Texas.

(b) Between carbon black manufacturers and other manufacturers requiring the use of gas for fuel.

Not only is said act and order of the Railroad Commission discriminatory, as applied to appellant and its properties, as hereinabove pointed out, but it is further discriminatory against appellant and its said properties, in this: said act authorizes the utilization of sweet gas for fuel purposes. It nowhere specifies or requires what kind of a manufacturing business in which one must be engaged, requiring the use of fuel, to be permitted under such act to use such gas for generating heat in such manufacturing process. And neither does such act require that the product manufactured by the use of such sweet gas for fuel purposes shall be of any required value, or that its value shall be in any fixed proportion to the amount or value of gas consumed for the fuel require-

ments in the manufacture of such product; further than this, the act nowhere requires that the product manufactured shall have any relation to the public necessity. So far as the act and order in themselves are concerned, anyone requiring gas for generating heat necessary for the manufacture of any character of product, regardless of its relative value, or public necessity, is permitted to use sweet gas without limitation, for such purpose. There is one, and only one, exception, and that is, if you are manufacturing carbon black the act says you cannot use sweet gas for this purpose. We say this is an arbitrary and unreasonable discrimination between the manufacturers of other products. The evidence is undisputed in this case, that not only in the manufacture of carbon black is there no physical waste of gas, but in addition thereto heat is absolutely required in the manufacture of such commodity and the heat units contained in such gas are actually utilized and applied in such manufacture for the purpose of generating heat in order to break down the chemical constituents of the gas and separate the carbon from the other elements contained therein.

The witness, Howard W. Price, mechanical engineer, and for the past fifteen years general manager of the carbon black manufacturing plants of the J. M. Huber Corporation, located in Louisiana, Texas and Wyoming, on this point testified as follows:

> "There is no physical waste of gas in the manufacture of carbon black. The reason for this being that in any process of taking carbon from its chemically combined hydrogen, it is necessary to apply

heat. In the manufacture of carbon black, the gas is used for both this necessary heat and as a source of raw material, and by restricted partial combustion the carbon is largely separated by the heat of the flame, with hydrogen and some carbon being consumed in the process. We, therefore, have in the manufacture of carbon black a process which requires a fuel to develop heat to break down the gas in its component parts. * * *" (R. 173.)

The witness, E. B. Reinbold, chemist in charge of the chemical laboratories of the J. M. Huber Corporation, testified as follows:

"Carbon black is obtained from the combination of hydro-carbons contained in natural gas by applying heat for the purpose of breaking down the gas in its component parts and separating the carbon from its chemically combined hydrogen. Thus, in the manufacture of carbon black there is neither waste of gas nor heat units contained therein, but actually, all of the heat units contained in the gas are utilized and applied to break down and separate the carbon black from the other chemical constituents in such gas. * * *" (R. 193.)

The witness, Clark C. Boardman, mechanical engineer, who for the past sixteen years has been in charge of the operation of plants for the production of gas carbon by the thermal decomposition process, testified as follows:

"The ordinary criticism of the carbon black industry is usually based upon the erroneous assumption that in the manufacture of carbon black the B. T. U. or heat units contained in the gas are wasted. In the manufacture of carbon black there

is no waste of gas nor of the heat units contained in such gas, for the reason that heat is required to take the carbon black from its chemically combined hydrogen. Thus, in order to manufacture carbon black from natural gas it is necessary to utilize and apply all of the heat units contained in such gas for the purpose of generating heat to break down and separate the carbon black from the other chemical constituents of such gas, and the more heat applied or heat units utilized, the finer and better quality of carbon black that will be obtained. When carbon black has been packed at the plant it is a finished article, ready to be used by the next processor, for instance, the production of automobile tires; in much the same way that stainless steel, tool steel or axle steel is a finished product at the steel mill and ready to be used by the next processors in the construction of industrial plants, machine tools and automobiles. Such high grade steels are the result of numerous processes requiring a large amount of heat, beginning with the smelting of iron ore, followed by heat treatments, alloying and finishing. These heating processes require the use of a very large quantity of fuel in the form of coal, coke, oil, or natural gas. Similarly, the production of electric power requires heat in very large quantities. The heat represented by one kilowatt hour of electricity is a very small fraction of the heat actually used for its generation, most of which is dissipated in the production of combustion going up in the smokestack and in the hot water that leaves the condensing equipment. It would be as reasonable to criticise and hamper the production of high grade steel and electric power as to criticise the use of the B. T. U. or heat units contained in natural gas, for the production of carbon black. * * *" (R. 201-202.)

The witness, H. H. Reardon, who for the past ten years has been general superintendent of the Colum-

bian Carbon Company, in charge of the operation of its carbon black plants, testified as follows:

> "There is no physical waste of gas nor of the heat units contained therein in the manufacture of carbon black. In any process of taking carbon from its chemically combied hydrogen it is necessary to apply heat, and in the manufacture of carbon black all of the heat units or B. T. U. content in the gas from which carbon black is being manufactured are actually utilized to generate heat to break down the gas in its component parts. Thus, in utilizing gas for the manufacture of carbon black, such gas is actually used for fuel purposes, just the same as gas may be used in smelting ore or manufacturing steel or in many other manufacturing processes where gas is used as a source of heat in order to produce the manufactured product. In the latter instance, the raw material from which the product is manufactured is separate and apart from the fuel used to apply heat to such raw materials in order to produce the manufactured product. In the former, the fuel used for generating the heat for manufacturing the product—which is carbon black—likewise contains the raw materials from which the carbon black is manufactured. * * *" (R. 188.)

It will be observed that the statute does not undertake to save, nor does it have the effect of saving, fuel gas for domestic use. Any kind of product may be manufactured by using natural gas, provided it is used for fuel. It matters not how relatively useless be the finished product or how much fuel, that is how many heat units, may be consumed in its manufacture, in relation either to the quantity of the product, its usefulness or its value. No prohibition is imposed.

What right has the Legislature to say that gas may be used *ad libitum* as fuel, to such extent as may be convenient to industries employing combustion to supply power, but that it may not be used in the manufacture of carbon black?

What difference can it make in law that appellant employs the gas in a useful way to manufacture a useful product under the process employed in the manufacturing of carbon black, whereas other industries make use of the gas in other ways for the manufacture of other products?

Within the industrial field how does the useful consumption of the heat units in a given way become sacred and their useful consumption in another way become the proper subject of legislative ban? In either case the heat is consumed, and a useful product is the result.

If such legislative fiat be lawful, what is to forbid the next next Legislature from saying that other industrial uses shall be forbidden because the gas is not employed in the same way in which it is employed in the making of carbon black? If, as a result of today's legislative whim or caprice carbon black may be condemned now, what is to hinder the next Legislature from placing carbon black on a pedestal and condemning other industries, if that should happen to accord with the caprice or whim of tomorrow?

We submit that the Legislature of Texas has no power to say that both sour gas and sweet gas from

a common reservoir, may be employed without restriction for use as fuel in generating heat in any and all kinds of industry, but that sweet gas shall not be employed in the manufacture of carbon black, which likewise, requires fuel to generate heat in the manufacture of such product.

In *DeGrazier v. Stevens*, 101 Tex. 194, the Supreme Court of Texas said:

> "A state may not, under the guise of the police power, make a discrimination for which no good reason can be assigned."

In *Clark v. Finley*, 93 Tex. 171, the same Court said:

> "The legislature may not, by a pretended classification, evade a constitutional restriction."

The declared purpose of the challenged act is conservation. Let it be assumed that this means conservation of gas for fuel purposes. The evidence as hereinabove pointed out is convincing that such gas, so classified by the Commission as sweet, will not be conserved for the purposes for which the act authorizes such gas to be used, but such gas will be drained and drawn to the sour gas producing wells and there utilized in the manufacture of carbon black. The evidence is further convincing that sweet gas and sour gas are equally fit for light and fuel purposes except for an insignificant increase in expense for processing. Hence, the discrimination does not accomplish the professed purpose. In

Atchison, etc., R. R. Co. v. Matthews, 174 U. S. 96, this Court said:

> "Even where the selection is obviously not unreasonable and arbitrary, if the discrimination is based upon matters which have no relation to the object sought to be accomplished, the same conclusion of unconstitutionality is affirmed."

In *Mayflower Farms v. Ten Eyck*, ... U. S. ....., 80 L. Ed. 475, this Court refused to allow for the play of the imagination to sustain the New York Milk Control Act, containing arbitrary, unreasonable discrimination. The act was within a field generally open to legislative regulation—public health. The good intentions of the Legislature were not questioned, and yet the classifications made by the Legislature with the view of promoting public health were unreasonable and therefore invalid. This Court said:

> "The appellees do not intimate that the classification bears any relation to the public health or welfare generally; that the provision will discourage monopoly; or that it was aimed in any abuse cognizable by law, in the milk business. In the absence of any such showing, we have no right to conjure up possible situations which might justify the discrimination. The classification is arbitrary and unreasonable and denies the appellant the equal protection of the law."

We quote from *R. C. L., Vol. 6*, pp. 399-440:

> "The discriminations which are open to objection are those where persons engaged in the same business are subjected to different restrictions, or are held entitled to different privileges under the same

conditions. However, since part of the liberty of a citizen consists in the enjoyment upon terms of equality with all others in similar circumstances of the privilege of pursuing an ordinary calling or trade, and of acquiring, holding, and selling property, *the constitutional guaranty as to the equal protection of the law requires that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; and that no greater burdens should be laid upon one than are laid upon others in the same calling and condition.*"[1]

In *Connelly v. Union Sewer Pipe Company*, 184 U. S. 539, 46 L. Ed. 679, this Court, at page 557, said:

"What may be regarded as a denial of the equal protection of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' *Missouri v. Lewis*, 101 U. S. 22, 31, sub nom. Bowman v. Lewis, 25 L. Ed. 989, 992. We have also said: 'The 14th Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoilation of property, but that equal

[1]Italics ours.

protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention of redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' * * *"

For the convenience of the Court, we take the liberty of quoting from *Cooley's Constitutional Limitations* (7th Ed.) pp. 561-562, as follows:

"If the Legislature should undertake to provide that persons following some specified trade should not have the right to make use of their property as was permissible to others, it can scarcely be doubted that the act would transcend the due bounds of legislative power, even though no express constitutional provision could be pointed out with which it would come in conflict. * * *

"To forbid to an individual or class the right to enjoyment of property in such manner as is allowed or permitted others is a deprivation of liberty, and those who claim a right to so forbid ought to be able to show a specific authority therefor, instead of calling upon others to show how and where the authority is negatived."

We, therefore, say that the complained of provisions of said statute are discriminatory and confiscatory, in that:

(a) They discriminate between appellant and other producers similarly situated for the reason that appellant's gas is dedicated to a use for which it is not afforded any market or outlet, and that the necessary and actual effect of the enforcement of the provisions of said statute will be to deny appellant the right to produce and utilize its gas, classified by the Commission as sweet gas, for carbon black manufacture, when, as a matter of fact, such gas will be drained and drawn to adjacent and adjoining sour gas wells and there appropriated by the owners of such wells and utilized for the very purpose for which said statute denies the appellant the right to use such gas; and,

(b) That they discriminate between the carbon black manufacturers and other manufacturers who require gas for fuel, in generating heat for the purpose of such manufacture, which, in effect, is discriminatory against appellant, for the reason that Combined Carbon Company is under contract with appellant to purchase appellant's gas; that such contract contemplates and covers the identical wells so classified by the Commission as sweet gas wells.

This is the actual effect of the statute, as applied to the Panhandle field and appellant and its properties, and as far as the State of Texas is concerned it will receive no actual benefit from the enforcement of the complained of provisions of said statute, as such gas

so classified by the Commission as sweet gas, in fact, will not be conserved for the uses for which the statute authorizes sweet gas to be utilized, for the reason that, under the undisputed evidence in the record, it is absolutely immaterial as to the total ultimate recovery from the Panhandle reservoir whether the carbon black demands be produced over the field generally or from one portion of such field.

The Court, in arriving at the ultimate question as to whether an act of the Legislature, passed in pursuance to the police power, is unreasonable and does not transcend the public necessity, will take into consideration and compare the injury and detriment that will be suffered by appellant to the benefit that could be reasonably derived from the operation of the act.

In *Houston & T. C. Ry. Co. v. City of Dallas*, supra, the Supreme Court of Texas said:

> "If it be true that there is to be no benefit to the public from the proposed change, or a benefit which is inconsiderable when compared to the detriment to be suffered by the respondent, who will say that it is just and reasonable to subject respondent to such expense and loss as averred? While the convenience of the public, in the use of the streets, is generally to be considered, and promoted, it may well be that in particular instances it should not be allowed to outweigh, in the adoption of such measures as that under consideration, a great and disproportionate injury to be inflicted on private interests in advancing it. When it is found that a proposed action is to be fraught with such consequences as those averred in the answer, a public exigency correspondingly great and urgent should be required in its support."

What public exigency requires the State to arbitrarily discriminate between appellant and other producers of gas similarly situated in the Panhandle field by denying appellant the right to utilize its gas in the manufacture of carbon black, but at the same time permit appellant's neighbors and adjacent owners of sour gas wells to produce appellant's gas and use it for the identical purpose for which appellant is denied the right to use it? What public exigency requires the State to arbitrarily discriminate between the carbon black industry and other industries, when both need and require gas for fuel purposes in the manufacture of their respective products? What public exigency requires the State to say that the use of sweet gas for the manufacture of carbon black constitutes waste when, in truth and in fact, it does not? What public exigency requires the complete confiscation of private property and property rights when the State or public is not benefitted thereby?

5. THE ENFORCEMENT OF THE COMPLAINED OF PROVISIONS OF SAID STATUTE WILL IMPAIR THE OBLIGATIONS OF APPELLANT'S CONTRACTS.

It is pleaded and shown in evidence that, here, contract rights involving large sums of money are impaired by the statute under attack. This presents the question: Under the Constitution of Texas which prevails: The right of the Legislature and of the Commission, acting under its purported authority, to regulate production, or vested contract rights of appellant?

The evidence in this case shows that of the fourteen wells connected with appellant's plant, which have been

classified by the Legislature and the Commission as sweet gas wells, under the provisions of said act, four are owned by appellant, and as to the others appellant owns and holds casinghead gas contracts covering the same, under the terms of which appellant is required to take and receive the gas capable of being produced from such wells and to process the same in its said gasoline plant for the purpose of extracting the gasoline content therefrom. That all of such casinghead gas contracts were made and entered into long prior to the passage of the act here complained of; that in addition thereto appellant, on October 9, 1934, made and entered into a contract with Combined Carbon Company, under the terms of which appellant is obligated to deliver to said Combined Carbon Company the residue gas produced from said wells and the remaining wells connected with appellant's plant, sufficient to meet the requirements of Combined Carbon Company, for a period of ten years from the date of such contract. That Combined Carbon Company, in relying upon such contract, has built and constructed a carbon black manufacturing plant near appellant's plant at Sanford, Texas, and that the present requirements of Combined Carbon Company, which appellant is obliged to deliver, are 30,000,000 cubic feet of gas per day, and that additional future requirements of Combined Carbon Company, which appellant under said contract is obliged to deliver, will depend upon the extent of the additions made by said Combined Carbon Company to said plant, and that appellant cannot fulfill its said contract with Combined Carbon Company if the provisions of said act and order of the Railroad

Commission, here complained of, are enforced against it. That the classification of fourteen of said wells of appellant as sweet, and the prohibiting of appellant to use any gas produced therefrom in its said plant and and to deliver the residue thereof to Combined Carbon Company, has depleted and taken away from appellant the majority of its gas reserves, and to such extent has impaired and placed in jeopardy its said contract with Combined Carbon Company. And, in this connection, the evidence shows that the contract of Combined Carbon Company, made with appellant, covered and contemplated the gas capable of being produced from the identical fourteen wells involved in this cause (R. 211-219); that by reason of the depletion of appellant's reserves by such classification, and the impairment of appellant's obligation to deliver gas under the terms of such contract, Combined Carbon Company is now threatening to attempt to cancel and abandon said contract and to look elsewhere for its gas requirements, unless appellant is permitted to utilize gas from said fourteen wells, as contemplated under said contract with Combined Carbon Company, or unless appellant, at prohibitive cost, rehabilitates its reserves to the extent that the same have been depleted by such classification (R. 207-208); that in addition to this, if the complained of provisions of said act and order be enforced, it will destroy and abrogate the subject matter of such contracts, in that appellant will be prohibited in the taking of any gas for its operations, under the terms of said contracts, and appellant doubtless will be subjected to attempted cancellation and forfeiture of its said casinghead gas contracts, solely by

reason of the fact that it will be denied, under the provisions of said act and order, the right to utilize the gas from said wells for the purposes for which said contracts were made.

The *Texas Constitution (Bill of Rights)*, Sec. 16, Art. I, provides:

> "No bill of attainder, ex post facto law, retroactive law, or any law impairing the obligation of contracts, shall be made."

We submit that this provision is superior to, and prevails over, any and all rights claimed here for the Commission to make and for the Legislature to authorize, the orders here under attack. Neither the police power nor the conservation provision of the Constitution (Art. 16, Sec. 59a), nor any enactment or order, can have any force to authorize any impairment of the obligation of a contract. This is plainly and authoritatively and finally held.

Travelers Ins. Co. v. Marshall, 76 S. W. (2) 1011 (Sup. Ct.);
Murphy v. Phillips, 3 S. W. (2) 405 (C. C. A.).

In *Travelers Ins. Co. v. Marshall*, supra, the Supreme Court of Texas said:

> "Article I of the Constitution, comprising 29 sections, is designated the Bill of Rights and consists of express *limitations of power*.[1] The last section declares: 'Sec. 29. To guard against transgressions of the high powers herein delegated, we declare that

[1]Italics ours.

everything in this "Bill of Rights" *is excepted out of the general powers of government, and shall forever remain inviolate, and all laws contrary thereto * * * shall be void"*[1]

"On the concession, for the purposes of this decision, that the majority opinion in the Blaisdell case, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, at the time it was delivered correctly interpreted the contract clause of the Federal Constitution in relation to the exercise of the police power by the states (art. 1, sec. 10, ch. 1), it can have no application to the Constitution of Texas. *The Federal Constitution, it is said, contains no express limitations on the police power of the states as such.*[2] 12 Corpus Juris, p. 928, Art. 440. The majority opinion in the Blaisdell case, 290 U. S. 398, 54 Sup. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481, seems to be based upon the proposition that, although the contract clause in the Federal Constitution prohibits the impairment of contracts by state legislation, still a wide range of police control may be exercised by the states, varying with differing conditions, even to the extent of impairing previously existing contracts. 290 U. S. pp. 434, 435, 439, 54 Sup. Ct. 231, 78 L. Ed. 413, 88 A. L. R. 1481. It is quite obvious the same rule of interpretation cannot be applied to the contract clause in our State Constitution, for the reason that, unlike the Federal Constitution, the rights guaranteed by that clause (sec. 16, art. 1) are by section 29 of the Bill of Rights 'excepted out of the general powers of government, * * * and all laws contrary thereto, * * * shall be void.' *This is an express limitation on the police power which does not appear in the Federal Constitution, a limitation which plainly prohibits the enactment of legislation the effect of which is to impair the obligation of contracts.*[3] * * *

[1]Italics ours.

[2]Italics ours.

[3]Italics ours.

"We recognize, of course, that the police power is broad and comprehensive; but the Constitution forbids its exercise when the result would be the destruction of the rights, guaranties, privileges, and restraints excepted from the powers of government by the Bill of Rights.

" 'However broad the scope of the police power, it is always subject to the rule that the legislature may not exercise any power that is expressly or impliedly forbidden to it by the state constitution.' 12 C. J., p. 929, Sec. 440; Bell v. Hill (Tex. Sup. Ct.), 74 S. W. (2) 120; State ex rel. Cleveringa v. Klein, 63 N. D. 514, 249 N. W. 118, 86 A. L. R. 1523; Milkint v. McNeeley, 113 W. Va. 804, 169 S. E. 790, and other authorities supra.

"Since the impairment of the obligation of contracts is prohibited by section 16, article 1 of the Bill of Rights, without any specified exception in favor of legislative action to the contrary during industrial depressions or emergency periods, we are without power to write such an exception into the organic law. As said by one of the Texas authorities previously cited: 'The enactment of laws impairing the obligation of contracts is forbidden by section 16 of article 1 of the Constitution of Texas. * * * The limitation thus imposed is emphatic, unambiguous and without exception; it applies alike to all contracts and protects all obligations of contracts from destruction or impairment by subsequent legislation.' 9 Tex. Jur. p. 541, Sec. 106."

In *Murphy v. Phillips*, supra, the San Antonio Court of Civil Appeals said:

"Article 1, Sec. 16, Texas Constitution, provides as follows: 'No bill of attainder, ex post facto law,

retroactive law, *or any law impairing the obligation of contracts*, shall be made.[1]

"Section 29, same article, provides as follows: 'To guard against transgerssions of the high powers herein delegated, we declare that everything in this "Bill of Rights" is excepted out of the general powers of government, *and shall forever remain inviolate, and all laws contrary thereto*,[2] or to the following provisions, *shall be void.*'[3]

"By these constitutional provisions the power of the Legislature of this state to enact legislation which directly impairs the obligation of a contract is not only taken out of the police power of the state, *but all powers of government.*[4]

"When the Legislature has clearly and directly done that which our Bill of Rights says shall not be done, then it becomes the duty of the judiciary to declare such enactments null and void. Bronson v. Kinzie, 1 How. 311, 11 L. Ed. 143, Sturges v. Crowinshield, 4 Wheat. 122, 4 L. Ed. 529."

A marked distinction exists betwen the Federal Constitution and our State Constitution on this point. There is no provision in the Federal Constitution which prevents a holding that pre-existing contracts must yield to the police power. Accordingly, this Court has held, in effect, that, insofar as the Federal Constitution is concerned, contracting parties must proceed upon the

[1]Italics ours.

[2]Italics ours.

[3]Italics ours.

[4]Italics ours.

theory that their contracts are liable to be abrogated by the exercise of the police power.

Stephenson v. Binford, 287 U. S. 251, 53 Sup. Ct. 181; 77 L. Ed. 288;

However, the plain and unmistakable effect of recent holdings of our highest Texas courts is that the above quoted provisions of Section 29 of our Bill of Rights carve out the provisions of the Bill of Rights from any and all general powers of government, and render them immune from any and all effects of the exercise of any and all general powers of government. Thus, Chief Justice Cureton, speaking for our Supreme Court, in the Travelers Insurance Company case, said that the provisions of Section 29 of the Bill of Rights constitute "*A limitation which plainly prohibits the enactment of legislation, the effect of which is to impair the obligation of contracts.*"[1]

This is compelling language, and, we respectfully submit, requires a holding in the case at bar that the provisions of the act under attack can have no application to strike down the contracts involved in this case, and that insofar as they purport or are claimed to do so they are void and without effect.

It is to be noted that Section 29 of the Bill of Rights, above quoted, declares all laws in conflict with the Bill of Rights to be "void." Our Courts have uniformily held

[1]Italics ours.

that the term "void," when used in our Constitution, means "void" and nothing less than what that term implies.

Inge v. Cain, 65 Tex. p. 79;
Madden v. Madden, 15 S. W. 482;
Limestone County v. Knox, 234 S. W. 131;
Furr v. Chapman, 286 S. W. 171, 173.

Nothing could be better settled than that the "Federal Courts are bound to follow the decisions of the highest courts of the state upon questions relating to the construction of the state constitution." *25 C. J. p. 832.*

III.

The Doctrine of Stare Decisis, in View of This Court's Holding in Walls v. Midland Carbon Company, Has No Application to the Issues Presented Here.

The appellees in the District Court strongly relied upon the decision of this Court in *Walls v. Midland Carbon Company*, 254 U. S. 300, 65 L. Ed. 276. They made the contention that the holding of this Court in that case was decisive of the issues presented here. That case is distinguishable from the case at bar upon many grounds, among them the following:

1. The rule of property in Wyoming is different from the rule of property in Texas, the rule in Wyoming being similar to the rule of property in Indiana. This was pointedly brought out by this Court in its decision and perhaps was controlling in the conclusion reached, for the reason that the Court relied upon the case of

Ohio Oil Co. v. Indiana, 277 U. S. 190, and in discussing that case, said:

> "We said, citing a case, 'possession of the land is not necessarily possession of the gas,' and again on the authority of cases, 'that the property of the owner of lands in oil and gas is not absolute until it is actually in his grasp, and brought to the surface.' It was decided, however, that before that event occurs, indeed, in prevention of it, the state may interpose its power to prevent a waste or disproportionate use of either oil or gas by a particular owner in order to conserve the equal right of other owners and advance the public interest.
>
> "It was hence decided that the power of the state can be manifested for the purpose of protecting all the collective owners, by securing a just distribution, to arise from the enjoyment by them of their privilege to reduce to possession, and to reach the like end by preventing waste. * * *
>
> "It will be observed that the basic principle of the Indiana statute is the same as the basic principle of the Wyoming statute; that is the power of regulation dependent on the natures of oil and gas and that the absolute dominion of the surface of the land is not an unlimited dominion over them."

Analyzing the above holding, it means simply this: That a state in which the common pool doctrine prevails has the power to regulate the production of oil and gas for the purpose of accomplishing two objects: first, to prevent physical waste, and second, to prevent a disproportionate taking from a common pool in order to protect the correlative rights of the common owners in such pool. To accomplish the first object, we admit that the State of Texas has the power, but as to the second

object, we say that under the rule of property prevailing in Texas the State of Texas does not have the power to regulate the production of oil and gas for the purpose of protecting the correlative rights of the owners irrespective of the question of waste.

The term, "disproportionate taking," as used in the Walls case, is not synonymous with the term "wasteful production," and disproportionate taking does not necessarily embrace physical waste, but this Court in the Walls case held that under the facts in the record in that case the Midland Carbon Company was taking a disproportionate amount of the gas from the common pool as compared to the taking for light and fuel purposes from such pool, and that therefore the State of Wyoming could, under the rule of property existing in that state, prohibit such disproportionate taking, irrespective of the question of waste, in order to protect the correlative rights of the owners in the common pool.

2. The facts in the Walls case are entirely different from the facts in the case at bar in the following particulars:

(a) Undoubtedly, in the Walls case there was a disproportionate taking of the gas in its physical state by the carbon company, as compared to the other producers for fuel purposes, whereas, the act here under attack specifically authorizes withdrawals from the common reservoir to the extent necessary to fulfill the respective market requirements of carbon black manufacturers and light and fuel use, and in addition thereto disallows dis-

proportionate taking by requiring ratable production. But if it be contended that the Court held in that case that the disproportionate taking on the part of the carbon company embraced a wasteful utilization of the gas, utilized by it for the manufacture of carbon black, then we say that the evidence in the Walls case, which would warrant or justify that conclusion, is entirely lacking in the case at bar, for the following reasons:

In the Walls case the evidence showed no distinction between the total carbon contained in one thousand cubic feet of gas and the product carbon black manufactured therefrom. In other words, it is a fair assumption to say that upon the record in that case the manufacture of carbon black appeared wasteful, in that only one and three-fourths pounds of carbon black was obtained from thirty-three to forty pounds of carbon, the assumption being that the element carbon and carbon black are synonymous and the carbon black recovery should have been greater, whereas under the record in this case it is undisputed that all of the carbon black that is contained in the gas in the Panhandle field is actually being recovered; that there is a wide and vast distinction between the product carbon black and element carbon; that if all of the total carbon contained in the gas in the Panfield were possible of recovery, it would not be carbon black, it would not have any commercial value or utility, and would be wholly worthless. Why, then, should the

product carbon black be compared to the element carbon in order to arrive at any degree of efficiency? This cannot any more be logically done than comparing high grade steel to the ore in its original state from which it is manufactured. Indeed, under the record in this case, we must assume that the carbon industry approaches nearer one hundred per cent efficiency than other industries manufacturing finished products, or those industries using fuel for the generation of heat or energy. Under the record in this case, there is no disproportionate taking of gas for carbon black manufacture by Combined Carbon Company, or others engaged in similar business in the Panhandle field, and such term has no application to the facts before this Court in this case.

The Walls case was tried upon the theory, and the evidence recited in the opinion of the Court discloses, that the heat units contained in the gas utilized for carbon black manufacture were wasted. In this case the evidence is overwhelming and entirely uncontroverted that all of the heat units contained in the gas utilized for the manufacture of carbon black are actually used and applied for the purpose of generating heat to break down the gas in its component parts and separate the carbon black from the other chemical constituents in such gas; that there is absolutely no waste of the heat units in the gas. In this connection we desire to point out to the Court that the act under attack authorizes the use of

sweet gas for fuel purposes, except that it denies its use to the carbon black manufacturer, even though such manufacture requires fuel to generate heat to manufacture carbon black.

(b) The facts in the case at bar show that the Panhandle field is underlaid by a common pool and that this common pool contains both sweet and sour gas, between which, said act differentiates; that there is no structural barrier between the sweet and sour area and withdrawal from one area will affect the recovery from the other area, and our act in effect arbitrarily cuts off a portion of a common pool and says to the carbon industry, "you can operate here but not elsewhere, although in truth and in fact one character of gas upon which you are operating is not different, basically, than the other gas in the common pool, from which you are denied the right to utilize gas." There was no such fact situation in the Walls case. Furthermore, in the case at bar, there is the question of drainage by reason of the location of the sweet and sour areas in one common pool, the act permitting unequal withdrawals from such areas in proportion to their respective market demands. There was no such question or state of facts involved in the Walls case.

(c) Undoubtedly, the classification under the Wyoming statute bore a reasonable relation to the conservation of the fuel supply of the field in which the carbon

company was located, for the reason that testimony was introduced and undoubtedly was considered by the Court, that if the carbon company were permitted to continue its operations the gas supply in the field would be exhausted in eighteen months, but if the gas consumed by the carbon company was conserved the field would supply the domestic and industrial use of the towns of Lovell and Crowley for a period of ten years. What evidence is there in this case that shows, or even tends to show, that the Legislature, by the act under attack, in making the arbitrary classification between sweet and sour gas in a common pool, conserved directly or indirectly the gas supply in the Panhandle common reservoir, when the very act permits withdrawal from such reservoir to the extent of the respective market demands for carbon black manufacture and light and fuel purposes, and the classification therefore has no relation to the conservation or prevention of waste, for the reason that with or without the classification the ultimate recovery of gas from the reservoir will be the same; and in addition thereto the evidence shows that the gas under appellant's leases, which it is prohibited from using in the manufacture of carbon black, will actually be drained to and produced through the adjacent sour producing wells and there used in the manufacture of carbon black. There are no such fact conditions in the Walls case. In addition to this, the evidence in the rec-

ord shows that the Panhandle field, under the rate of withdrawal for the first six months of 1935, for all purposes, will last for a period of seventy years. (R. 167-168.)

(d) At the time of the trial of the Walls case, the carbon black industry was in its infancy and possibly the nature of its manufacture and the necessity for the product were not and could not have been fully developed. So important has the product of carbon black become, in the last few years, and so essential to the public welfare is such commodity, that the courts today should not be bound by a conclusion reached fifteen years ago, relative to the necessity and the methods of manufacture of a product which today has such a wide range of utility.

We believe from what is said above that the Walls case is clearly distinguished from the case at bar and that it has no application here.

CONCLUSION

We submit that the staute involved, having been properly challenged by appellant on the ground that its enforcement will be violative of appellant's constitutional rights, that the Court not only has the power but that it is its duty to inquire into the fact basis for such statute, and that under the overwhelming preponderance of the evidence in the record it has been conclusively established by appellant that the provisions of the stat-

ute, here under attack, and the orders of the Railroad Commission promulgated in pursuance thereto, bear no reasonable relation to the purposes sought to be accomplished by the statute, when applied to the Panhandle gas field where appellant's properties are situated, and that through the enforcement of such provisions appellant will suffer irreparable injury; that the complained of provisions of said statute as applied to appellant and its properties are patently discriminatory, arbitrary and unreasonable, and will result in the confiscation of appellant's properties, and are therefore, unconstitutional and void.

Wherefore, it is prayed that the judgment and decree of the District Court be reversed.

Respectfully submitted,

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APPENDIX "A"

HOUSE BILL 266

"Section 1. Declaration of policy: In recognition of past, present, and imminent evils occurring in the production and use of natural gas, as a result of waste in the production and use thereof in the absence of correlative opportunities of owners of gas in a common reservoir to produce and use the same, this law is enacted for the protection of public and private interests against such evils by prohibiting waste and compelling ratable production.

"Article 6008 of the Revised Civil Statutes of Texas of 1925 as amended by Chapter 26, Acts of the First Called Session of the Forty-second Legislature, as amended by Chapter 100, Acts of the Regular Session of the Forty-third Legislature, as amended by Chapter 88, Acts of the First Called Session of the Forty-third Legislature, is hereby amended so as to hereafter read as follows:

"Section 2. Unless the context otherwise requires, the words defined in this Section shall have the following meaning when used in this Article, to-wit:

"(a) 'Commission' means the Railroad Commission of Texas;

"(b) 'Person' means any natural person, corporation, association, partnership, receiver, trustee, guardian, executor, administrator and a fiduciary or representative of any kind;

"(c) The term 'Common Reservoir' as used in this Article shall mean any oil and/or gas field or part thereof which comprises and includes any area which is underlaid, or which from geological or other scientific data or experiments or from drilling operations or other evidence appears to be underlaid by a common pool or accumulation of oil and/or gas;

"(d) The term 'gas well' is any well (a) which produces natural gas not associated or blended with crude petroleum oil at the time of production, or (b) which produces more than one hundred thousand (100,000) cubic feet of natural gas to each barrel of crude petroleum oil from the same producing horizon, or (c) which produces natural gas from a formation or producing horizon productive of gas only enocuntered in a well bore through which crude petroleum oil also is produced through the inside of another string of casing;

"(e) The term 'oil well' is any well which produces one (1) barrel or more of crude petroleum oil to each one hundred thousand (100,000) cubic feet of natural gas.

"(f) 'Dry gas' is any natural gas produced from a stratum that does not produce crude petroleum oil.

"(g) The term 'sour gas' shall mean any natural gas containing more than one and one-half (1½) grains of hydrogen sulphide per one hundred (100) cubic feet or more than thirty (30) grains of total sulphur per one hundred (100) cubic feet, or gas which in its natural state is found by the Commission to be unfit for use in generating light or fuel for domestic purposes;

"(h) The term 'sweet gas' shall mean all natural gas except 'sour gas' and 'casinghead gas';

"(i) The term 'casinghead gas' shall mean any gas and-or vapor indigenous to an oil stratum and produced from such stratum with oil;

"(j) The term 'natural gasoline' shall apply to gasoline manufactured from casinghead gas or from any natural gas;

"(k) For the purposes of this Article, by the term 'cubic foot of gas' is meant volume of gas expressed in cubic feet and computed at a base pressure of four (4) ounces per square inch above the average barometric pressure of 14.4 pounds per square inch, a standard base and flowing temperature of sixty (60) degrees Fahrenheit; correction to be made for pressure according to test made by the Balance Method.

"Section 3. The production, transportation, or use of natural gas in such manner, in such amount, or under such conditions as to constitute waste is hereby declared to be unlawful and is prohibited. The term 'waste' among other things shall specifically include:

"(a) The operation of any oil well, or wells with an inefficient gas-oil ratio.

"(b) The drowning with water of any stratum or part thereof capable of producing gas in paying quantities.

"(c) Underground waste or loss however caused and whether or not defined in other subdivisions hereof.

"(d) Permitting any natural gas well to burn wastefully.

"(e) The creation of unnecessary fire hazards.

"(f) Physical waste or loss incident to, or resulting from, so drilling, equipping, or operating well or wells as to reduce or tend to reduce the ultimate recovery of natural gas from any pool.

"(g) The escape into the open air, from a well producing both oil and gas, of natural gas in excess of the amount which is necessary in the efficient drilling or operation of the well.

"(h) The production of natural gas in excess of transportation or market facilities, or reasonable market demand for the type of gas produced.

"(i) The use of natural gas for the manufacture of carbon black without first having extracted the natural gasoline content from such gas.

"(j) The use of sweet gas produced from a gas well for the manufacture of carbon black.

"(k) Permitting any natural gas produced from a gas well to escape into the air before or after such gas has been processed for its gasoline content.

"(l) The production of natural gas from a well producing oil from a stratum other than that in which the oil is found, unless such gas is produced in a separate string of casing from that in which the oil is produced.

"(m) The production of more than one hundred thousand (100,000) cubic feet of gas to each barrel of

crude petroleum oil unless such gas is put to one or more of the uses authorized for the type of such gas so produced under allocations made by the Commission.

"Section 4. (a) If oil and/or gas be produced through different strings of casing set in the same well bore, the inner string through which oil and/or gas be produced shall be regarded as one well, and each successive additional string of casing through which oil and/or gas shall be produced, from a different producing horizon, the others producing through the same well bore, shall be regarded as another well.

"(b) No person in possession of or operating any oil well shall produce from such well natural gas found in a horizon productive of natural gas only.

"Section 5. The Commission is given authority to fix and determine the gas-oil ratio of all oil wells in this State, but nothing in this Act shall be construed to authorize the limitation of the production of marginal wells as such marginal wells are defined, below the amount fixed by statute. If any restriction imposed by the Commission upon the production of oil from any oil well operates to increase the gas-oil ratio of such well so as to then classify it as a gas well under the provisions of this Article, such well shall be deemed to be an oil well nevertheless.

"Section 6. The Commission shall make and enforce rules, regulations, or orders for the conservation of natural gas, to prevent the waste thereof, and otherwise to accomplish the purposes of this Article, including rules, regulations, or orders for the following purposes:

"(1) To prevent the waste, as hereinbefore defined, of natural gas in the drilling and producing operations and in the piping and distribution thereof.

"(2) To require dry or abandoned wells to be plugged in such way as to confine natural gas, and water in the strata in which they are found and to prevent them from escaping into other strata.

"(3) For the drilling of wells and preserving a record thereof.

"(4) To require wells to be drilled and operated in such manner as to prevent injury to adjoining property.

"(5) To prevent natural gas and water from escaping from the strata in which they are found into other strata.

"(6) To require records to be kept and reports made.

"(7) To provide for the issuance of permits, and other evidences of permission when the issuance of such permits or permission is necessary or incident to the enforcement of its blanket grant of authority to make any rules necessary to effectuate the law.

"Section 7. After the expiration of ten (10) days from the time of encountering gas in a gas well, no gas from such well shall be permitted to escape into the air, and all gas produced therefrom shall be utilized for the following purposes:

"(1) No sweet gas shall be utilized except for:

"(a) Light or fuel.

"(b) Efficient chemical manufacturing, other than the manufacture of carbon black.

"(c) Bona fide introduction of gas into oil, or gas bearing horizon, in order to maintain or increase the rock pressure or otherwise increase the ultimate recovery of oil or gas from such horizon.

"(d) The extraction of natural gasoline therefrom when the residue is returned to the horizon from which it is produced.

"(2) In addition to the purposes for which sweet gas produced from a gas well may be used, sour gas may be used for efficient chemical manufacturing purposes including the manufacture of carbon black provided it is utilized in a plant producing a recovery of not less than one (1) pound of carbon black to each one thousand (1000) cubic feet of gas, and provided further that the gasoline content is removed and saved from such sour gas before the same is utilized for carbon black.

"(3) Casinghead gas may be used for any beneficial purpose, which includes the manufacture of natural gasoline.

"(4) Any producer of either sweet or sour gas or casinghead gas may use the same as gas lift in the bona fide production of oil where such gas is not used in excess of ten thousand (10,000) cubic feet per barrel of oil produced; provided that in order to prevent waste in any case where the facts in such case warrant it, the Commission may permit the use of additional quantities

of gas to lift oil provided all such gas so used in excess of ten thousand (10,000) cubic feet for each barrel of oil shall be processed for natural gasoline and the residue burned for carbon black when same is reproduced.

"Section 8. It shall be the duty of all persons, companies or corporations producing natural gas from any gas well to ascertain and determine during the months of January and July, respectively, of each year hereafter, through appropriate tests to be made in the presence of and under the supervision of a representative of the Commission, and under uniform and generally recognized methods, and under regulations which shall be prescribed by the Commission, the open flow and rock pressure of each gas well from which natural gas shall be produced, and verified reports thereof shall be filed with the Commission on or before the tenth day of each of the months aforesaid; which said reports shall be kept on file with the Commission and shall become a permanent public record and shall be open to the inspection and examination of the public, and which said reports shall disclose the name of the representative of the Commission who was actually present when such tests were made. If any person producing gas from the same common reservoir be dissatisfied with the test as made and reported, such person may demand a second test to be made in the manner herein provided and in the presence of such person or his representative.

"Section 9. The Railroad Commission shall require one of its duly authorized agents to inspect, read or test any meter, or meters, through which natural gas is being

measured, or gauged, upon the request of any lessor, lessee, operator, or royalty owner from whose land, lease, or royalty interest natural gas is being produced.

"Section 10. It shall be the duty of the Commission to prorate and regulate the daily gas well production from each common reservoir in the manner and method herein set forth. The Commission shall prorate and regulate such production for the protection of public and private interests:

"(a) In the prevention of waste as 'waste' is defined herein.

"(b) In the adjustment of correlative rights and opportunities of each owner of gas in a common reservoir to produce and use or sell such gas as permitted in this Article.

"Section 11. The Commission shall exercise the authority to accomplish the purpose designated under item (a) of Section 10 when the presence or imminence of waste is supported by a finding based upon the evidence introduced at a hearing to be held as herein provided.

"The Commission shall exercise the authority to accomplish the purpose designated under item (b) of Section 10 when evidence introduced at a hearing to be held as herein provided will support a finding made by the Commission that the aggregate lawful volume of the open flow or daily potential capacity to produce of all gas wells located in a common reservoir, is in excess of the daily reasonable market demand for gas from gas wells that may be produced from such common reservoir, to be utilized as permitted in this Article.

"Section 12. On or before the 20th day of each calendar month the Commission shall hold a hearing after notice has been given, as provided by law, for the purpose of determing the aggregate capacity to produce of all gas wells in a common reservoir, and as nearly as possible, the daily volume of gas from each common reservoir that will be produced from gas wells during the following month to be utilized as permitted in this Article. Upon such determination, the Commission, based upon evidence introduced at such hearing, shall allocate to each gas well producing gas from such common reservoir a percentage of the daily productive capacity of each well which may be produced daily during the following month from each gas well producing gas from such common reservoir. Such percentage of the daily producing capacity of each well shall be regarded as its daily allowable production of such daily volume required for utilization from such common reservoir. The daily allowable production of each gas well shall be computed and allocated as provided in Sections 13 and 14.

"Section 13. In determining the daily allowable production for each gas well the Commission shall take into account the size of the tract segregated with respect to surface position and common ownership upon which such gas well or wells are located; the relation between the daily producing capacity of each gas well and the aggregate daily capacity of all gas wells producing the same kind of gas in the same common reservoir or zone; and all other factors which are pertinent; provided that the Commission shall not take into account the size of

the tract upon which any gas well or wells are located in excess of the efficient drainage area of such well or wells, producing at 25 per cent of the daily productive capacity, which drainage area shall be determined by the Commission. In ascertaining the drainage area of a well, the Commission shall take into account such factors as are reflected in the productive capacity of a gas well, including formation pressure, the permeability and porosity of the producing formation, and the well bore's structural position, together with all other factors taken into account by a reasonably prudent operator in determining the drainage area for a gas well.

"Section 14. It shall be the duty of the Commission, after notice and hearing, to ascertain and determine the reasonable market demand for gas from gas wells to be used for light and fuel purposes and for all other lawful purposes to which sweet gas may be put under the terms of this Article and by proper order to restrict the production of gas from all gas wells in said field producing such gas to an amount equal to market demand or to an amount which may be produced without waste as otherwise defined; provided, however, the production of such gas shall in any event be restricted to the amount of the reasonable market demand therefor. In such order the Commission shall allocate, distribute or apportion the total allowable production from such field among the various gas wells affected by the order on a reasonable basis, and as provided in Section 13. It shall likewise be the duty of the Commission to prorate the daily gas well production of sour gas produced from each common

reservoir of sour gas in this State. The hearing for such purpose shall be held at the same time as the hearing pertaining to the proration of sweet gas well production. The proration of sour gas well production shall be accomplished according to the manner and method herein provided for the proration of sweet gas well production.

"Section 15. Nothing contained in this Article shall require that the production from any gas well with a daily natural open flow of two hundred thousand (200,000) cubic feet of natural gas or more to be restricted to a quantity less than fifty thousand (50,000) cubic feet of natural gas daily; and nothing herein shall require that the production from any gas well with a daily natural open flow of less than two hundred thousand (200,000) cubic feet of gas be reduced to a quantity less than 25 per cent of its natural open flow.

"In all common reservoirs producing both sweet and sour gas, no well shall be permitted to produce in excess of 25 per cent of its daily productive capacity; provided the Commission, upon a finding that reservoir conditions require that such percentage be increased to prevent waste, and that such increase will not create a drainage condition as between sweet and sour gas lands, may authorize an increase in such allowable production. Where the allowable production theretofore allocated to any well is more than 15 per cent of its daily producing capacity, and the Commission finds that the production of its daily allowable from such well will cause waste due to the intermingling of sweet and sour gas, the Commission may order the production from such well re-

stricted to 15 per cent of its daily producing capacity, but this sentence shall not be construed to militate against the right of the Commission to fix the allowable production of any well below 15 per cent of its daily producing capacity in carrying out the requirements of Sections 13 and 14 of this Act.

"Section 16. It shall be unlawful for any person to produce gas from a gas well as herein defined in excess of the daily allowable production in such schedule of allowable production. The rate of production from any gas well shall be deemed to be the average daily rate of production for the month.

"Section 17. Where gas is produced from one stratum and oil and gas is produced from another stratum in the same well bore, the Commission shall take into account the amount of gas produced from the oil stratum in determining the amount of gas that may be produced from the stratum producing gas only and may subtract the amount of the casinghead gas produced from the dry gas that would be allocated to said well if it produced dry gas and may restrict the dry gas production accordingly.

"Section 18. When unforeseen contingencies increase the demand for gas required by any distributor, transporter or purchaser to an amount in excess of the total allowable production of the wells to which he is connected, such distributor, transporter or purchaser is authorized to increase his take ratably from all such wells in order to supply his demand for gas, provided, however, that notice of such increase and the amount thereof shall be given to the Commission within five (5) days;

and provided further that the Commission, at its next hearing, shall adjust the inequality of withdrawals caused by such increase in fixing the allowable production of the various wells in the common reservoir or zone.

"Section 19. If the Commission finds upon consideration of the evidence introduced at a hearing that either or both of the purposes designated under Section 10 of this Article may be more adequately accomplished by zoning a common reservoir, the Commission sholl zone such common reservoir. If the Commission zones such common reservoir, each zone shall be regarded as a separate common reservoir in making allocations of daily allowable production as provided in this Article. The Commission shall allocate to each zone its just proportion of the market demand for gas from the common reservoir, and shall establish appropriate rules and regulations applicable to each zone and shall have the right to adjust its orders to the practicable conditions which exist and to enter any reasonable order which is necessary to effectuate the purpose of this law. The Commission is expressly authorized to segregate a sour gas area from a sweet gas area and shall not be required to restrict the allowable production of the sour gas zone to the same percentages that may be produced from the sweet gas zone.

"Section 20. In the event the Commission finds that the owner of any gas well has failed or refused to utilize or sell the allowable production from his well when such owner has been offered a connection or market for such

gas at a reasonable price, such well shall be excluded from consideration in allocating the daily allowable production from the reservoir or zone in which same is located until the owner thereof signifies to the Commission his desire to utilize or sell such gas. In all other cases all gas wells shall be taken into account in allocating the allowable production among wells producing the same type of gas.

"Section 21. In order that land owners and operators that have undeveloped land within a proven natural gas field may secure a market for their natural gas, and in order that the market for natural gas may be more equitably distributed among the various land owners and operators, and in the interest of the conservation and development of natural gas, it is declared to be lawful for any two or more lessors, lessees, operators, or other persons, firms, or corporations owning or controlling production, leases, royalties or other interest in the separate properties of the same producing gas field, with the approval of the Attorney General of Texas, to enter into agreements for the purpose of bringing about cooperative development and/or operation of all or a part or parts of such field, or for the purpose of fixing the time, location and manner of drilling and operating wells for the production, storage, marketing or the repressuring of gas, or for the purpose of the equitable distribution of royalty payments. Any such agreement shall bind only the parties thereto, and their successors and assigns of such having knowledge or notice thereof, and shall be enforceable in an action for specific performance.

"Section 22. The Commission shall be vested with a broad discretion in administering this law, and to that end shall be authorized to adopt any and all rules, regulations or orders which it finds are necessary to effectuate the provisions and purposes of said law.

"Section 23. Any person violating any of the provisions of this Article shall be liable to a penalty not to exceed One Thousand Dollars ($1,000.00) for each offense, and each day's violation shall be a separate offense. Such penalty may be recovered by the State of Texas with the cost of suit in a civil action instituted in Travis County or in the County where the violation occurred by the Attorney General or by the County or District Attorney when joined by the Attorney General of Texas; and any and all violations or threatened violations of this Article may be enjoined by any Court of competent jurisdiction in which the suit for penalty may be brought, and in such cases the Court may issue such writs of injunction, mandatory or prohibitory, as the facts justify.

"Section 24. Any person may appeal for judicial review from any rule, order, or regulation of the Commission made and promulgated under the authority conferred by this Article in the same manner, upon the same conditions and to the same court or courts as prescribed in this Chapter for appeals from other rules, regulations or orders of the Commission, promulgated under the general Oil Conservation Statutes of this State.

"Section 25. All laws or parts of laws in conflict with any of the provisions of this Act are hereby expressly repealed; provided that on account of the absence of pipe lines necessary to accomplish transportation of gas to carbon black plants from many areas producing sour gas in one or more of the common reservoirs of this State and in as much as many wells producing sweet gas are without market outlet for gas used as light and fuel which will require considerable time to make connection after hearing to determine the allowable production, it is provided that gas from a well producing sour gas only may be utilized as provided in said Article 6008 of the Revised Civil Statutes of 1925 as amended by Acts of the First Called Session of the Forty-second Legislature, as amended by Acts of the Regular Session of the Firty-third Legislature as aforesaid, until October 1, 1935, and the gas from a well producing sweet gas may be utilized as authorized under said Act as amended until August 1, 1935, at which time this Article shall be effective as to sweet gas wells; provided, however, that nothing in this Act contained shall repeal, modify or impair any of the provisions of House Bill No. 782, relating to oil and gas conservation, enacted at this session of the Legislature, or shall impair the power of the Commission, proceeding under the oil and gas conservation laws of this State, to prevent waste.

"Section 26. If any section or sections, clause, sentence or provision of this Article should, for any reason, be held to be invalid or unconstitutional, it shall not affect in anywise the remaining parts of this Article, not

so held, and all that portion not held invalid shall remain in full force and effect.

"Section 27. The presence and imminence of evils occurring in the production and use of natural gas as a result of the waste in the production and use thereof in the absence of correlative opportunities of owners of gas in the common reservoirs of this State to produce and use the same, have created an emergency and imperative public necessity demanding the suspension of the Constitutional Rule requiring Bills to be read on three separate days in each House, and said Rule is hereby suspended, and this Act shall take effect from and after its passage, and it is so enacted."